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Are Police Free to Disregard Miranda?

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Are Police Free To Disregard *Miranda*?

Steven D. Clymer[†]

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INTRODUCTION

*Miranda v. Arizona*¹ is the Supreme Court's best-known criminal justice decision.² It also may be its most misunderstood. Most people familiar with police television programs, movies, or books understand *Miranda* to require police to advise suspects of their rights to silence and counsel.³ Many judicial and academic descriptions of *Miranda* comport with that view. They characterize *Miranda* as a law enforcement duty, one that police violate if they either conduct custodial interrogation without first giving proper warnings and securing a valid waiver, or if they fail to terminate questioning upon a suspect's request.⁴

Contrary to that understanding, *Miranda* and its progeny impose no such obligation on police. Rather, like the Fifth Amendment privilege that

1. 384 U.S. 436 (1966).

2. See, e.g., Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1418 (1985) (describing *Miranda* as "our best known criminal case"); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 840 (1996) (describing *Miranda* as "the Supreme Court's most famous criminal law decision"); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 671 (1996) ("The *Miranda* warnings may be the most famous words ever written by the United States Supreme Court.").

3. On the prominence of *Miranda* in popular culture, see, for example, RICHARD A. LEO & GEORGE C. THOMAS III, *THE MIRANDA DEBATE*, at xv (1998) ("School children are more likely to recognize the *Miranda* warnings than the Gettysburg address. Perhaps this is not surprising given that the warnings have thoroughly permeated our culture through television shows and movies."); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (describing *Miranda* as "a household word in American popular culture"); and Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2538 n.336 (1996) (listing police television programs).

4. See, e.g., *Cooper v. Dupnik*, 963 F.2d 1220, 1244 (9th Cir.) (en banc) (asserting that police commit misconduct by deliberately ignoring the assertion of rights), *cert. denied*, 506 U.S. 953 (1992); *People v. Peevy*, 953 P.2d 1212, 1225 (Cal.) (arguing that police who fail to honor invocation of *Miranda* rights act "illegally"), *cert. denied*, 525 U.S. 1042 (1998); Peter Arenella, *Miranda Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 380 (1997) (describing the intentional decision to violate *Miranda* rules as "strategic misconduct"); John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1150 (1998) (noting that *Miranda* "commands action by police"); Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 476 (1999) [hereinafter Kamisar, *Confessions*] (arguing that police who deliberately ignore invocation of *Miranda* rights violate suspects' rights); Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 972 n.199 (1995) [hereinafter Kamisar, *Miranda Fruits*] (describing the failure to provide the *Miranda* advisement as an "illegality"); Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 426 (1994) ("The [*Miranda*] Court did appear to hold, however, that the Fifth Amendment applies at the station house and that the defendant must be apprised of his rights to prevent a violation of the Self-Incrimination Clause." (citations omitted)); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 188 (1998) (describing police who deliberately fail to follow *Miranda* rules as acting in an "open and direct defiance" of a principle of law); David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 806 (1992) ("Ever since *Miranda v. Arizona*, the police have been required to inform a suspect in custody, prior to any questioning, that he has a right to remain silent, that his statements may be used against him at trial, and that he may have retained or appointed counsel present during the interrogation." (citations omitted)).

serves as its foundation, *Miranda* is best understood as a constitutional rule of admissibility. The privilege bars improper use of compelled statements in criminal prosecutions of those who made the statements. But, if there are assured restrictions on later use, the privilege does not prohibit the government from employing compulsion to elicit testimony or statements. For example, a prosecutor can compel testimony from a reluctant witness by immunizing her and threatening to prosecute her for contempt if she refuses to answer questions. Courts not only permit this compulsion, they also participate by issuing immunity orders and incarcerating contemptuous witnesses. Because an immunity grant assures the witness that her statement will not be used against her in a criminal case, the act of compelling her to testify does not violate the privilege. In other contexts, the Court likewise permits the government to compel statements so long as it cannot make later use of them in criminal prosecutions.⁵ Unlike the Fourth Amendment proscription on unreasonable searches and seizures, which is a direct restraint on police conduct that courts enforce through a judicially created exclusionary rule,⁶ the Fifth Amendment privilege is simply an exclusionary rule.⁷

The *Miranda* Court held that compliance with the now-familiar warnings and waiver requirements, or an effective substitute, is necessary to dispel compulsion inherent in custodial interrogation. But, if police interrogators refrain from conduct that violates due process, their decision to employ that compulsion by disregarding *Miranda*'s requirements, rather than to allay it by complying with them, does not run afoul of the Constitution.⁸ *Miranda* requires only suppression of any resulting statements. Even if one reads *Miranda* broadly, to hold that the pressures resulting from custodial interrogation always constitute sufficient compulsion to trigger the privilege, police utilization of that compulsion to elicit statements is no less constitutional than prosecutorial use of the more explicit compulsion of immunity grants and contempt threats. If police are willing to suffer the exclusionary consequences, they can disregard the *Miranda* rules without violating the Constitution.⁹

5. See *infra* Subsection I.A.3.

6. See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) (describing the Fourth Amendment exclusionary rule "as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect'" (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))).

7. See *infra* note 120 and accompanying text (describing the Fifth Amendment privilege as an exclusionary rule).

8. For a discussion of the due process constraints on police and their relationship to the *Miranda* doctrine, see *infra* notes 122-128 and accompanying text.

9. An explanation of terminology is in order here to avoid confusion. Because the *Miranda* doctrine is a rule of admissibility only, it addresses courts, not police, telling them when suspects' statements are compelled and thus inadmissible. As a result, police cannot "violate *Miranda*." But, admissibility of suspects' statements is contingent on police compliance with the rules that the *Miranda* decision describes—those requiring warnings, a valid waiver, and termination of

This understanding, which has received scant attention in the extensive *Miranda* literature, is significant for at least two reasons. First, as some courts and scholars have recognized, it makes clear that police officers who fail to follow the *Miranda* warning and waiver guidelines are not liable in civil actions under 42 U.S.C. § 1983 for violating suspects' constitutional rights.¹⁰ Second, and more importantly, it reveals that a police officer's decision whether to give *Miranda* warnings and honor a suspect's assertion of rights is properly guided solely by an assessment of the costs and benefits of compliance and noncompliance, not fidelity to a constitutional norm. Police disregard of *Miranda* is not a constitutional wrong.

Even absent a constitutional duty, police likely would obey the *Miranda* rules if the costs of noncompliance outweighed the benefits. If the Supreme Court had interpreted *Miranda* to impose a robust exclusionary rule, similar to the one that applies to formally immunized testimony, police would have good reason to obey the *Miranda* rules. But the Court has not taken that approach. Instead, it has made it advantageous for police to disregard the *Miranda* rules, not just in certain situations, but routinely. The Court's decisions offer a number of evidentiary advantages that encourage police to violate the *Miranda* rules: preservation of suspects' postarrest silence for impeachment, an increased likelihood of obtaining fully admissible statements by first taking unwarned statements and then "curing" the violations, and the ability to obtain otherwise unavailable post-invocation statements that are admissible to impeach testimony and that may serve as useful sources of leads to other evidence. As a result, it often is prudent for police to initiate questioning of suspects in custody without first giving warnings and securing waivers. If a suspect asks to remain silent or speak with counsel, there is good reason for police to continue questioning. Although some courts and scholars have criticized police who deliberately violate the *Miranda* rules by taking statements "outside *Miranda*,"¹¹ such conduct is both constitutional and, under existing doctrine, sensible. There may be reason to be troubled by police disregard of the *Miranda* rules, but criticism should be directed at the Court for creating the incentives that drive police conduct, not at police who act in accordance with those incentives.

interrogation upon the assertion of rights. See *infra* notes 158-160 and accompanying text. Thus, although references to "police violations of *Miranda*" are misleading (because violations can occur only if courts improperly admit compelled statements), it is accurate to refer to "police violations of the *Miranda* rules" (which affect admissibility but do not by themselves transgress the Constitution).

10. See *infra* Subsection I.B.2.

11. Weisselberg, *supra* note 4, at 132-40. For a discussion of the criticism of police who deliberately violate the *Miranda* rules, see *infra* note 224 and accompanying text; *infra* note 415 and accompanying text.

Federal appellate courts that have addressed this issue have determined all but unanimously that police who fail to comply with the *Miranda* rules do not violate the Constitution.¹² Instead, a violation occurs only if the resulting statements are used in a criminal case. Because there is nonetheless some difference of opinion among lower federal courts, there is a good chance that the Supreme Court soon will grapple with this issue. Indeed, at the end of the October 2001 Term, the Court granted a petition for a writ of certiorari in a case that presents the closely related question of whether the privilege can be violated absent use of a compelled statement in a criminal case.¹³ The Court has given indications that it views both the privilege and *Miranda* as rules of admissibility, not ones governing police conduct.¹⁴ If the Court interprets *Miranda* or the privilege accordingly, it will signal to police departments that they are free to disregard *Miranda* if they are willing to pay the price of exclusion. Because the *Miranda* exclusionary sanction is a mild one, that message likely will lead to increased, and perhaps widespread, police noncompliance with the *Miranda* rules. Thus, despite *Miranda*'s reprieve in *Dickerson v. United States*,¹⁵ in which the Court held that the *Miranda* rules enjoy a constitutional pedigree,¹⁶ the future of the *Miranda* rules is both uncertain and bleak.

But there is an alternative. Acknowledgment that *Miranda* is an exclusionary rule is one part of a larger realization—that the *Miranda* doctrine is an interpretation of the Fifth Amendment privilege, not a freestanding body of rules. Treatment of *Miranda* as an offspring of the privilege rather than as only a distant cousin should cause the Court to rethink at least some of the decisions in which it created incentives for police to violate the *Miranda* rules. The rationales that it offered to support those decisions—deterrence theory and its own characterization of the *Miranda* rules as “prophylactic”—cannot be squared with the understanding that *Miranda* is a privilege-based exclusionary rule. The Court has not abandoned the view that statements taken in violation of the *Miranda* rules are, or must be presumed to be, compelled within the meaning of the Fifth Amendment privilege. As a result, unless it provides more persuasive reasons for differential treatment, the Court should treat such statements as it does immunized testimony and other compelled statements. Thus, paradoxically, recognition that *Miranda* does not impose direct restraints on police could serve as an important step toward making it a more powerful indirect restraint by bolstering its exclusionary effect.

12. See *infra* Subsections I.B.2, I.D.1.

13. See *infra* notes 424-425 and accompanying text.

14. See *infra* notes 115-119 and accompanying text; *infra* notes 170-171 and accompanying text.

15. 530 U.S. 428 (2000).

16. *Id.* at 444 (“*Miranda* announced a constitutional rule . . .”).

Part I of this Article explores whether police have a constitutional obligation to comply with the *Miranda* rules. Such an obligation exists only if the act of compelling a statement, rather than using the statement in a criminal case, is a constitutional violation. Part I begins by demonstrating that the Fifth Amendment privilege against compelled self-incrimination—the sole constitutional provision upon which the *Miranda* doctrine rests—prohibits only the use of compelled statements in criminal cases. It then shows that although *Miranda* is the result of a number of creative and controversial interpretive steps, none involves expansion of the privilege to impose a direct restraint on police conduct during interrogation. *Miranda*, like the Fifth Amendment privilege, can be violated only when compelled statements are used in a criminal case. Part I concludes by describing and refuting arguments by jurists and scholars that the taking of compelled statements alone can violate the privilege, *Miranda*, or both. To avoid any misunderstanding, it bears mention that Part I takes no position on whether *Miranda* is a wise decision,¹⁷ a legitimate exercise of the Court's power to interpret the Constitution,¹⁸ or a significant impediment to law enforcement.¹⁹

Part II examines the incentive structure that the Supreme Court has created for police officers deciding whether to comply with the *Miranda* rules. Although others have addressed these incentives, Part II offers a more complete picture, describing the full range of costs and benefits at each stage of the interrogation process. It first recounts three sets of the Court's decisions—addressing impeachment with postarrest silence, impeachment with statements taken in violation of the *Miranda* rules, and admission of evidence derived from statements taken in violation of the *Miranda* rules. It then explains how those decisions make it advantageous for police to disregard the *Miranda* rules in many, perhaps most, cases.

Part III focuses on the future of the *Miranda* doctrine. It predicts that the Supreme Court either will decide that police do not violate the Constitution by disregarding the *Miranda* rules or will leave intact federal appellate court decisions that have reached that conclusion. It then discusses three possible future paths for the *Miranda* doctrine. Two

17. Compare Caplan, *supra* note 2, at 1419 (contending that “*Miranda* was not a wise or necessary decision” and that “[i]t sent our jurisprudence on a hazardous detour”), with Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 2 (1986) (noting that *Miranda* “represents an appropriate compromise between the competing considerations of protecting individual rights and promoting the interests of law enforcement”). For a novel criticism of *Miranda*, see William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001) (contending that *Miranda* adopted a failed strategy of having criminal suspects, rather than courts, regulate police interrogation practices through decisions whether to make statements, giving sophisticated suspects too much protection and unsophisticated ones too little). For a classic attack, see HENRY J. FRIENDLY, *BENCHMARKS* 266-84 (1967).

18. See *infra* note 23.

19. See *infra* note 370.

possibilities are retention of existing *Miranda* doctrine and abandonment of *Miranda*. Given those options, Part III suggests that both criminal defendants and the public might be served better by the latter than by the continued existence of a rule that may have little effect on police interrogation practices and that may stifle reform. Part III also offers a third option, one in which the Court reconciles *Miranda* with its "pure" Fifth Amendment jurisprudence rather than treating it as a distinct set of rules. That reconciliation should prompt the Court to rethink the decisions in which it created incentives for police to violate the *Miranda* rules, such as those permitting impeachment with statements taken in violation of the *Miranda* rules, those permitting admission of evidence derived from such statements, and the one in which it created the "public safety exception" to *Miranda*.

I. DO POLICE HAVE A CONSTITUTIONAL OBLIGATION TO COMPLY WITH THE *MIRANDA* RULES?

Police should heed the *Miranda* rules if they have a legal obligation to do so or if compliance furthers legitimate objectives related to the investigation and prosecution of crime. It makes sense to begin by focusing on whether there is a legal obligation, that is, whether the Constitution requires allegiance to the *Miranda* rules.²⁰ If it does, police should follow them despite any advantage that they might gain from disobedience. For example, in the context of the Fourth Amendment, no one credibly could suggest that police deliberately should search homes without probable cause, thus violating the prohibition on "unreasonable searches and seizures,"²¹ even if doing so assists criminal prosecutions by supplying evidence with which prosecutors can impeach defendants' trial testimony.²²

After years of uncertainty and debate, it now is settled that the *Miranda* rules have a constitutional basis.²³ But the Court has yet to resolve

20. State constitutions, statutes, or administrative regulations may impose obligations on police that require *Miranda*-like warnings and waivers. This Article is limited to the question of whether the *Miranda* doctrine itself imposes legal obligations on police.

21. U.S. CONST. amend. IV.

22. See, e.g., *United States v. Havens*, 446 U.S. 620, 626-28 (1980) (holding that evidence seized in violation of the Fourth Amendment is admissible to impeach a defendant's testimony on cross-examination); *Walder v. United States*, 347 U.S. 62, 65 (1954) (holding that evidence seized in violation of the Fourth Amendment is admissible to impeach a defendant's testimony on direct examination).

23. In *Michigan v. Tucker*, the Supreme Court stated that the *Miranda* rules are "procedural safeguards [that are] not themselves rights protected by the Constitution but . . . instead measures to ensure that the right against compulsory self-incrimination was protected." 417 U.S. 433, 444 (1974). Focusing on language and similar passages in later opinions, see *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (characterizing *Miranda* warnings as "prophylactic"), some scholars questioned the

definitively whether those rules, like the Fourth Amendment's direct ban on unreasonable searches and seizures, impose obligations on police officers who conduct custodial interrogation or, instead, whether they determine only the admissibility of resulting statements.²⁴ The issue turns on what

constitutional legitimacy of the *Miranda* doctrine, see, e.g., Leo, *supra* note 2, at 675 (arguing that "federal courts only have legitimate supervisory authority over state courts in constitutional matters; the Burger Court ruled in *Michigan v. Tucker* that the *Miranda* warnings are not of constitutional stature themselves, but rather are merely prophylactic measures designed to protect underlying constitutional rights; therefore the Supreme Court's attempt to impose *Miranda* on state courts represents an illegitimate extension of federal power" (footnotes omitted)); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123 ("The implications . . . of the *Tucker* opinion are potentially devastating for *Miranda*. The Court deprived *Miranda* of a constitutional basis but did not explain what other basis for it there might be."). The legitimacy issue was linked to the constitutionality of 18 U.S.C. § 3501, a statute that Congress passed in 1968 in an effort to "overrule" *Miranda*. See, e.g., Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 887-906 (2000) (describing the enactment). If *Miranda* lacked solid constitutional footing, Congress would be entitled to abrogate it.

A spirited debate about *Miranda*'s legitimacy followed between *Miranda*'s defenders, see, e.g., Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987) [hereinafter Schulhofer, *Reconsidering Miranda*]; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988), and its critics, see, e.g., Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175 (1999); Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988) [hereinafter Grano, *Reply*]; Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) [hereinafter Grano, *Prophylactic Rules*]. During Edwin Meese's tenure as Attorney General, the Department of Justice published a report condemning *Miranda* as an improper exercise of judicial power. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), reprinted in 22 U. MICH. J.L. REFORM 437, 451-572 (1989); see also Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 740-42 (1987) (describing Attorney General Meese's oral remarks about *Miranda*); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938 (1987) (responding to Schulhofer's defense of *Miranda*); Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987) (replying to Markman's article). However, the government rarely invoked § 3501 or challenged *Miranda* in court during this period. See Davis v. United States, 512 U.S. 452, 463-64 (1994) (Scalia, J., concurring) ("[W]ith limited exceptions [§ 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment . . ."). But see Cassell, *supra*, at 198-203 (describing Department of Justice efforts to enforce § 3501 before 1992).

When the Court considered this issue in *Dickerson v. United States*, the Department of Justice, then led by Janet Reno, urged the Court to uphold *Miranda*. See Respondent's Brief at 6-10, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525). The *Dickerson* Court held that *Miranda* was constitutionally based and that § 3501 was unconstitutional. 530 U.S. at 444 ("[W]e conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively."). For a discussion of the *Dickerson* decision, see, for example, Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898 (2001); Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1 (2001); Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879 (2001) [hereinafter Kamisar, *Foreword*]; and Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387 (2001) [hereinafter Kamisar, *A Close Look*].

24. But see *infra* note 116 and accompanying text (noting dicta from *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), stating that "[a]lthough conduct by law

constitutes a *Miranda* violation. If police exploitation of the compulsion inherent in custodial interrogation—by questioning an arrested suspect without first giving proper warnings and securing a valid waiver, or by ignoring a suspect's request to remain silent or consult counsel—is itself a violation, *Miranda* governs police conduct directly. But if a violation occurs only in a criminal prosecution when either a prosecutor makes or a court permits improper use of a statement taken in violation of the *Miranda* rules, *Miranda* does not impose a direct obligation on police.²⁵

It is tempting to think of *Miranda* as a rule governing police conduct directly. Indeed, the *Miranda* Court's objective was to control police overreaching during custodial interrogation.²⁶ Rather than simply resolving a case or controversy, the Court fashioned a broad rule applicable to all police questioning of in-custody suspects,²⁷ leaving little doubt that it was

enforcement officials prior to trial may ultimately impair [the privilege against self-incrimination], a constitutional violation occurs only at trial").

25. Others have addressed the question of when a *Miranda* violation occurs. Compare Weisselberg, *supra* note 4, at 180 ("Perhaps the best view [of *Miranda*] is that the violation occurs at the station house, but continues or recurs at trial."), with Martin R. Gardner, *Section 1983 Actions Under Miranda: A Critical View of the Right To Avoid Interrogation*, 30 AM. CRIM. L. REV. 1277, 1288 (1993) ("A violation [of *Miranda*] does not occur until the product of . . . compulsion is used against the suspect, i.e., until she becomes a witness against herself." (citations omitted)). For an analysis of the question of when various constitutional violations occur, including violations of *Miranda*, see Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989) (describing Fourth Amendment violations, *Miranda* violations, violations of the Sixth Amendment right to counsel in the context of statements to police and lineups, and violations of due process involving coerced confessions).

Some observers have linked the issue of *Miranda*'s constitutional legitimacy, see *supra* note 23, with whether it imposes an obligation on police to comply with the warning and waiver requirements, see, e.g., Weisselberg, *supra* note 4, at 111 (describing the Court's decisions characterizing *Miranda* rules as "prophylactic" as part of a process that has caused some to view *Miranda* "as a weak, non-constitutional rule of evidence"). But, even if one accepts the *Dickerson* Court's conclusion that *Miranda* is a constitutional rule based on the Fifth Amendment privilege, the question remains whether police conduct alone, without admission of a suspect's compelled statement, can violate *Miranda*.

26. In Part I of its opinion, the *Miranda* Court explained how "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals," 384 U.S. 436, 455 (1966), and described the need for "a proper limitation upon custodial interrogation," *id.* at 447.

Perhaps one could ascribe to the *Miranda* Court the different objective of preventing only the prosecution's use of statements compelled during custodial interrogation to obtain convictions. If the *Miranda* Court's sole goal had been to exclude statements compelled during custodial interrogation, not to regulate interrogation practices, it would be clear that *Miranda* speaks only to courts. But it is difficult to reconcile that reading of *Miranda* with Part I of the opinion, in which the Court describes a host of concerns about police interrogation itself, not about convictions based on compelled statements. Of course, as explained in the text, even if the Court's *objective* was to control police interrogation, the constitutional provision that it chose to accomplish that task governs only admissibility.

27. See *id.* at 441-42 ("We granted certiorari in these cases . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow."); see also Dripps, *supra* note 23, at 14 (noting that "the Court was engaged in an extraordinary project: not just resolving some difficult cases, but establishing general rules to guide police and lower courts in handling confessions"); Stone, *supra* note 23, at 107 ("Rightly or wrongly, *Miranda* was deliberately

more concerned with that general enterprise than with deciding the cases before it.²⁸ The standard academic approach to *Miranda* also can leave the impression that it is a rule governing police conduct. Casebooks and articles often present *Miranda* as the culmination of the Court's struggle to find in the Constitution an effective means of controlling police interrogation practices.²⁹ They describe the Court's use of, and eventual frustration with, the Fourteenth Amendment due process voluntariness test;³⁰ its expansion of the Sixth Amendment right to counsel to encompass pretrial, postindictment interrogation,³¹ coupled with the short-lived extension of that right to at least some pre-indictment questioning;³² and finally its

structured to canvass a wide range of problems, many of which were not directly raised by the cases before the Court.”).

28. The Court joined four cases for decision in *Miranda*: *People v. Stewart*, 400 P.2d 97 (Cal. 1965), *State v. Miranda*, 401 P.2d 721 (Ariz. 1965), *People v. Vignera*, 207 N.E.2d 527 (N.Y. 1965), and *Westover v. United States*, 342 F.2d 684 (9th Cir. 1965). See *Miranda*, 384 U.S. at 436 n.*. Contrary to its usual practice of describing the facts of the case at the outset of its opinion, the *Miranda* majority turned to the details of the cases only at the very end of its lengthy opinion, as if they were an afterthought. See *id.* at 491 (beginning the description of the facts of the cases on the fifty-third page of the sixty-one-page majority opinion). The Court had made brief mention of the cases earlier in its opinion. *Id.* at 456-57.

29. See, e.g., JOSEPH G. COOK & PAUL MARCUS, CRIMINAL PROCEDURE 669-750 (4th ed. 1997); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 440-500 (8th ed. 1994); ARNOLD H. LOEWY & ARTHUR B. LAFRANCE, CRIMINAL PROCEDURE: ARREST AND INVESTIGATION 459-508 (1996); MYRON MOSKOWITZ, CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE POLICE 429-59 (1995); Caplan, *supra* note 2, at 1427-58; Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal To Mirandize Miranda*, 100 HARV. L. REV. 1826, 1831-38 (1987); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 332-72 (1998); Weisselberg, *supra* note 4, at 112-25.

30. See *infra* notes 122-124 (describing the due process voluntariness test).

31. *Massiah v. United States* held that the Sixth Amendment right to counsel prohibits police from deliberately eliciting statements from indicted defendants. 377 U.S. 201, 205-06 (1964). *Massiah* was the Court's first use of the Sixth Amendment right to counsel as a means of controlling police interrogation. See *id.* at 209 (White, J., dissenting) (“The right to counsel has never meant as much before . . .”).

32. *Escobedo v. Illinois*, which the Court decided a month after *Massiah*, determined that pre-indictment custodial interrogation of a suspect who unsuccessfully had requested an opportunity to consult with his lawyer violated the Sixth Amendment right to counsel. 378 U.S. 478, 490-91 (1964). *Escobedo* could be read to hold that police were prohibited from conducting custodial interrogation of a suspect who had become the focus of an investigation unless his attorney was present. For example, in *United States v. Muzychka*, the Third Circuit stated:

Justice Goldberg's reasoning in *Escobedo*, however, that the sixth amendment right to counsel attached once the defendant was the target of an investigation, could with very little strain have been extended to a *per se* prohibition against governmental interrogation in the absence of counsel once an investigation evolved to the stage of an accusation which resulted in an arrest.

725 F.2d 1061, 1067 (3d Cir. 1984). Although the Court never has explicitly overruled it, “*Escobedo* was soon shoved offstage” by *Miranda*. Yale Kamisar, Brewer v. Williams, *Massiah*, and *Miranda*: What Is “Interrogation”? When Does It Matter?, 67 GEO. L.J. 1, 26 (1978). Later, the Court retreated from the view that the Sixth Amendment right to counsel plays such a prominent role in police interrogation, holding that the right attaches only after the initiation of formal proceedings. See, e.g., Brewer v. Williams, 430 U.S. 387, 398 (1977) (holding that the Sixth Amendment right to counsel attaches “at or after the time that judicial proceedings have been initiated . . . ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion))).

somewhat unexpected resort³³ to the Fifth Amendment privilege against self-incrimination in *Miranda*.³⁴ Although historically accurate and pedagogically useful, that approach can create the impression that the various constitutional doctrines that the Court employed simply are alternative methods of imposing constraints on police.³⁵

But, even if the *Miranda* Court's objective was to regulate police conduct by use of the most efficacious constitutional means that it had available, it does not follow that the chosen provision imposes direct restraints on police. The privilege may attack compelled self-incrimination by prohibiting only self-incrimination—the use of one's compelled statements to prove guilt in a criminal case—not the act of compulsion. In order to explore that possibility, it is useful to examine the *Miranda* doctrine from a different perspective than that which the standard account offers. Instead of focusing on the *Miranda* Court's objective and recounting its efforts to accomplish it, the discussion here begins by scrutinizing the constitutional provision that the Court employed—the Fifth Amendment privilege. The following Section explores whether the privilege outlaws compulsion to extract statements or instead bars only the use of such statements in criminal cases.

33. See Weisselberg, *supra* note 4, at 118 n.45 (describing the briefs of the parties and amici curiae in *Miranda* as placing primary emphasis on the Sixth Amendment right to counsel).

34. Although this Article occasionally refers to the "privilege against self-incrimination," that term "is not an entirely accurate description of a person's constitutional protection against being 'compelled in any criminal case to be a witness against himself.'" United States v. Hubbell, 530 U.S. 27, 34 (2000) (quoting U.S. CONST. amend. V). When describing that portion of the Fifth Amendment that often is characterized as "the privilege against self-incrimination" or, more recently, as "the right to remain silent," it is useful to keep in mind Professor Albert Alschuler's warning that "the history of the privilege against self-incrimination seems to reveal the tyranny of slogans. Shorthand phrases have taken on lives of their own. These phrases have eclipsed the goals of the doctrines that they purported to describe and even the texts that embodied these doctrines." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2665 (1996) (citation omitted); see also Joseph D. Grano, *Selling the Idea To Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 683 (1986) (reviewing FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (1986) and explaining why, "despite the frequent incantation of the phrase, no 'privilege against self-incrimination' exists in our law").

35. This approach also may foster misunderstanding about doctrines other than *Miranda*. Professor Arnold Loewy has argued persuasively that the Sixth Amendment right to counsel that the Court described in *Massiah* is, like *Miranda*, a right that guarantees only exclusion, and does not impose any restriction on police conduct. See Loewy, *supra* note 25, at 928-33 (contending that the right to counsel is a procedural right, not violated unless the statement is used at trial). Loewy also contends that due process can be violated by both the methods used to elicit a coerced confession and the use of such a confession. *Id.* at 933-39; see also *infra* note 124 and accompanying text (describing judicial decisions supporting the view that police conduct during interrogation can violate due process without regard to later use of resulting statements).

A. *The Fifth Amendment Privilege as a Rule of Admissibility*

1. *Text and Operation*

Consideration of the text of the Fifth Amendment privilege is an essential step in the process of determining whether it prohibits compulsion or governs admissibility. The language of the privilege—"no person . . . shall be compelled in any criminal case to be a witness against himself"³⁶—lends itself to several plausible interpretations.³⁷

First, one could construe "in any criminal case" to mean "during any criminal trial" and being "a witness against himself" to mean the act of giving in-court testimony. Under this narrow reading, the privilege would prohibit government use of threats of contempt or other penalties³⁸ to compel an unwilling defendant to take the witness stand and testify during his own criminal trial. It would not, however, prohibit the use of compulsion to obtain statements before trial, leaving both pretrial police and judicial interrogation of criminal defendants unfettered.³⁹ Although there is some support for this construction,⁴⁰ the Court long ago rejected it, determining instead that the privilege can operate outside of criminal trials as well as in them.⁴¹ That conclusion appears to be consistent with the Framers' intent.⁴²

36. U.S. CONST. amend. V.

37. The privilege applies to states as well as to the federal government. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

38. For example, a threat of prosecutorial or judicial comment on the defendant's failure to testify could be deemed sufficient compulsion to trigger the privilege. *See, e.g., Griffin v. California*, 380 U.S. 609, 612-15 (1965).

39. A number of scholars have extolled the virtues of pretrial judicial interrogation. *See, e.g.,* Donald A. Dripps, *Foreword: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 78 SUP. CT. REV. 699 (1988); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); Paul G. Kauper, *Judicial Examination of the Accused—a Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

40. *See, e.g.,* Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 2 (1930) ("Considered in the light to be shed by grammar and the dictionary, the words of the self-incrimination clause appear to signify simply that nobody shall be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant."); *see also* *Miranda v. Arizona*, 384 U.S. 436, 526-27 (1966) (White, J., dissenting) (quoting Corwin and noting that "there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provision any broader meaning" (citation omitted)); Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 241 (1998) ("If the fifth amendment constitutionalized a common law doctrine, it was a 'limited' right not to testify against oneself in one's own criminal trial . . ."); *cf. Jenkins v. Anderson*, 447 U.S. 231, 242 (1980) (Stevens, J., concurring) ("[T]he central purpose of the Fifth Amendment privilege is to protect the defendant from being compelled to testify against himself at his own trial.").

41. The Court described the rationale for rejection of the narrow reading of the privilege in *Michigan v. Tucker*:

[A] defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to

Second, one could equate “any criminal case” with “any criminal investigation or prosecution” and interpret “witness[ing] against himself” to include the making of any statement, either in or out of court, that later could be admitted in a criminal case against the person who made it. Under this approach, the privilege would be an anticompulsion rule, one that prohibits the government from compelling statements or testimony from criminal suspects and defendants at any point during an investigation or prosecution, without regard to the later use of the statements in a criminal case. This interpretation requires that the words “in any criminal case” be read to limit operation of the privilege to criminal matters, rendering it inapplicable in noncriminal settings and unavailable to persons who are not

give evidence against himself before a grand jury. Testimony obtained in civil suits, or before administrative or legislative committees, could also prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding.

417 U.S. 433, 441 (1974) (footnote omitted); see also *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (“It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them.”).

42. There is little direct evidence of the intent of the drafters of the Fifth Amendment privilege. See, e.g., Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1123 (1994) (“[T]he legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege.”). It is unlikely, however, that the drafters meant the privilege to prohibit only efforts to force defendants to testify in their own criminal trials. The taking of sworn testimony or statements, as opposed to unsworn statements, was the sort of “compulsion” that the privilege was meant to address. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 332-33 (1999) (Scalia, J., dissenting) (“The longstanding common-law principle, *nemo tenetur seipsum prodere*, was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony.”); Alschuler, *supra* note 34, at 2656-59; Moglen, *supra*, at 1098-100. When the Fifth Amendment was drafted, however, and for some time thereafter, criminal defendants were not permitted to give sworn testimony at trial. See, e.g., *Mitchell*, 526 U.S. at 332 (Scalia, J., dissenting) (noting that in 1791, “common-law evidentiary rules prevented a criminal defendant from testifying in his own behalf even if he wanted to do so”); *Ferguson v. Georgia*, 365 U.S. 570, 577 (1961) (describing the process, beginning in 1859, by which states first permitted criminal defendants to give sworn testimony at trial); Alschuler, *supra* note 34, at 2660-61 (describing the end of the testimonial disqualification of defendants). Thus, there was no need for a constitutional prohibition preventing the government from forcing them to do so. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 337 n.165 (2001) (“[B]ecause defendants could not testify in their criminal trials, [the privilege] was aimed at compulsion at other proceedings . . .”).

Instead, there is reason to believe that the privilege was directed, at least in part, at the then-well-established practice by which justices of the peace interrogated suspects before trial. Although such interrogation was permitted, as was the admission of resulting statements in criminal prosecutions, justices of the peace were not permitted to question suspects under oath. See Alschuler, *supra* note 34, at 2654-60; Moglen, *supra*, at 1094-99, 1123-29. Because the drafters of the privilege were more concerned with preservation of the status quo than reform, see Moglen, *supra*, at 1129 (“Rather than a program for the reform of the criminal law, these constitutional provisions, including the expression of the privilege against self-incrimination, were aimed conservatively, against future deviations from existing practice.”), they may have meant to preserve the prohibition on the use of the oath in connection with pretrial questioning of criminal suspects.

under criminal investigation or prosecution. Despite some support,⁴³ the Court has rejected this view of the privilege, making clear that it operates in noncriminal settings and is available to persons other than criminal suspects and defendants.⁴⁴ As a result, the words “in any criminal case” do not limit the contexts in which the privilege can operate. Therefore, they must mean something else.⁴⁵

But, if the privilege operates outside criminal proceedings and applies to efforts to elicit statements or testimony from persons other than criminal suspects and defendants, what does the prohibition on “compell[ing a person] in any criminal case to be a witness against himself” mean? The key lies in the Court’s interpretation of the privilege as a protection that operates in two settings: (1) when there is an effort to elicit a statement or testimony, and (2) when the government attempts to introduce a previously compelled statement in a criminal case.⁴⁶

At the outset, it bears mention that in the first setting, the privilege often does nothing to prohibit the government from compelling testimony. The government generally is free to demand answers to questions both

43. See Hazlett, *supra* note 40, at 242 (contending that the Fifth Amendment privilege was not meant to constitutionalize common law doctrine permitting witnesses to refuse to give self-incriminating testimony, but rather was limited to criminal defendants only); see also Alschuler, *supra* note 34, at 2666 (discussing “[l]inguistic confusion” resulting from the ambiguity of the phrase “privilege against self-incrimination,” which may be used to describe separate doctrines, one enabling sworn witnesses to refuse to answer potentially incriminating questions, the other involving criminal defendants giving testimony at their own trials).

44. See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (stating that the privilege enables “the individual . . . not to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings”); *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (“It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries.”).

45. There is almost no evidence of the Framers’ reason for including the words “in any criminal case” in the Fifth Amendment. The language was added after the privilege had been introduced in the First Congress. See *United States v. Balsys*, 524 U.S. 666, 674 n.5 (1998) (“[T]he Clause as originally drafted and introduced in the First Congress lacked the phrase ‘any criminal case,’ which was added at the behest of Representative Lawrence on the ground that the Clause would otherwise be ‘in some degree contrary to laws passed.’” (citing 5 *THE FOUNDERS’ CONSTITUTION* 262 (Philip B. Kurland & Ralph Lerner eds., 1987))).

46. See, e.g., *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 57 n.6 (1964) (“The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion.” (citation omitted)); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 173 (1992) (“The privilege is, in the first instance, a tool in the hands of a witness to fend off an interrogator (i.e., to keep from answering a question or to avoid a punishment for not answering). . . . The secondary effect of the privilege is to exclude evidence.”). Although these events can occur in a single setting, such as an effort to compel a defendant to testify during his own trial, see Herman, *supra*, at 173 (“The privilege additionally protects actual defendants by barring the prosecution from calling them as witnesses in their own criminal trials.”), they often occur at different times.

before and during trials.⁴⁷ It can force compliance with those demands by threatening contempt sanctions, including imprisonment, and can punish noncompliance by making good on the threats.⁴⁸ The privilege imposes a limited constraint on that power. It enables persons who have a legitimate fear that their statements will subject them to future criminal prosecution to refuse to answer questions without risking a contempt sanction,⁴⁹ even when a subpoena or court order has demanded testimony.⁵⁰ This aspect of the privilege applies in any "civil or criminal, formal or informal"⁵¹ proceeding, whether "administrative or judicial, investigatory or adjudicatory."⁵² The privilege does not apply, however, if the danger of

47. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (describing the obligation of "the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt"); *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion) (describing the power of the grand jury to "compel the attendance and the testimony of witnesses"); *Kastigar v. United States*, 406 U.S. 441, 443 (1972) ("The power of the government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence."); see also Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 313 (1991) (noting that "the general rule is that the government can legitimately compel witnesses to say what they know").

48. See, e.g., *Kastigar*, 406 U.S. at 442, 462 (affirming the lower court's ruling that held witnesses in contempt for refusal to answer grand jury questions and placing them in custody until they answered or the term of the grand jury expired); *Rogers v. United States*, 340 U.S. 367, 370, 375 (1951) (affirming a contempt conviction with a four-month sentence for refusal to answer questions before a grand jury).

49. A person may assert the privilege if a truthful answer could "furnish a link in the chain of evidence" needed to prosecute her in a criminal case. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Thus, a witness can claim the privilege even if answers would not "in themselves support a conviction." *Id.*; see also *Malloy*, 378 U.S. at 11-12 (reiterating the *Hoffman* standard).

50. See, e.g., *Malloy*, 378 U.S. at 2 (holding that a witness who had been ordered to testify before a court-appointed referee was entitled to assert the privilege); *Hoffman*, 341 U.S. at 479, 487-90 (holding that a witness could assert the privilege before a grand jury despite a court order to testify).

A proper invocation of the privilege does not operate as a blanket ban on further questioning. It only enables the witness to refuse to answer the question asked without penalty. A prosecutor may ask other questions to see whether the witness will answer them or again assert the privilege. *Mandujano*, 425 U.S. at 581 (plurality opinion) ("[E]ven when the grand jury witness asserts the privilege, questioning need not cease, except as to the particular subject to which the privilege has been addressed. Other lines of inquiry may properly be pursued." (citation omitted)).

The Court has determined that the privilege is not applicable in certain circumstances even if an honest answer could lead to criminal prosecution. See, e.g., *California v. Byers*, 402 U.S. 424, 431-34 (1971) (holding that a state statute could criminalize a motorist's failure to stop and give her name and address after involvement in an accident); *Shapiro v. United States*, 335 U.S. 1, 32-33 (1948) (holding that the privilege does not prevent government from imposing a legal obligation to keep and produce administrative records). See generally *United States v. Hubbell*, 530 U.S. 27, 35 (2000) ("[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege." (footnotes omitted)).

51. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

52. *Kastigar*, 406 U.S. at 444. The questioning need not be done by a public official. See, e.g., *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263-64 (1983) (holding that a witness was entitled to assert the privilege in a civil deposition with private litigants).

self-incrimination is remote or speculative,⁵³ or altogether nonexistent.⁵⁴ Similarly, the privilege does not enable a subpoenaed witness to refuse to disclose embarrassing but not self-incriminating information,⁵⁵ or that which incriminates only another.⁵⁶

The second setting is the criminal case of a person from whom self-incriminating statements or testimony has been compelled.⁵⁷ Although this setting usually is the trial itself, the Supreme Court has extended it to sentencing proceedings,⁵⁸ and, apparently, grand jury proceedings as well.⁵⁹

53. See, e.g., *Zicarelli v. N.J. Comm'r of Investigation*, 406 U.S. 472, 478 (1972) ("It is well established that the privilege protects against real dangers, not remote or speculative possibilities."); *Hoffman*, 341 U.S. at 486 ("[P]rotection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.").

54. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 326 (1999) ("It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege."); *United States v. Balsys*, 524 U.S. 666, 692 (1998) ("[W]hen a witness's response will raise no fear of criminal penalty, there is no protection for testimonial privacy at all."). Thus, a witness cannot assert the privilege if he is immune from prosecution because of the statute of limitations or some other bar, see, e.g., *Pillsbury Co.*, 459 U.S. at 266 n.1 (Marshall, J., concurring) ("[A] witness may be compelled to give testimony concerning his involvement in crime when he is protected from later prosecution by the Double Jeopardy Clause, by the applicable statute of limitations, or by a pardon." (citations omitted)), or has already disclosed the incriminating information, see, e.g., *Rogers v. United States*, 340 U.S. 367, 374-75 (1951) (holding that the witness could not rely on the privilege when there was no "real danger" of further incrimination after the witness had already revealed incriminating facts).

55. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 66-67 (1906) ("It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution."). See generally *Mandujano*, 425 U.S. at 572 (plurality opinion) (holding that the privilege cannot "be invoked simply to protect the witness' interest in privacy"); *Ullmann v. United States*, 350 U.S. 422, 430 (1956) (rejecting the claim that disabilities "such as loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium" should permit immunized witnesses to persist in refusal to answer questions).

56. See, e.g., *Mandujano*, 425 U.S. at 572 (plurality opinion) ("The privilege cannot . . . be asserted by a witness to protect others from possible criminal prosecution."); *Rogers*, 340 U.S. at 371 ("[A] refusal to answer cannot be justified by a desire to protect others from punishment . . ."); *Hale*, 201 U.S. at 69-70 ("It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.").

57. See sources cited *supra* note 46 (describing the exclusion of a compelled statement in a criminal trial as the second facet of the privilege). Proceedings that are not within "the commencement and culmination of a criminal case," *Weaver v. Brenner*, 40 F.3d 527, 535 (2d Cir. 1994), are not included, and the privilege does not require exclusion there of compelled statements, see, e.g., *Mitchell*, 526 U.S. at 328 (noting that prison disciplinary and clemency proceedings are not part of "the criminal case—the explicit concern of the self-incrimination privilege"); *Allen v. Illinois*, 478 U.S. 364, 368-74 (1986) (holding that the privilege did not bar use of compelled statements in a civil proceeding involving involuntary commitment of a sexual offender); *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (noting that because a probation revocation proceeding "is not a criminal proceeding," a probationer's claim that he was compelled to make a statement would not give rise to a "valid claim of the privilege on the ground that the information sought can be used in revocation proceedings").

58. See *Mitchell*, 526 U.S. at 327 ("To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." (citation omitted)).

59. In *United States v. Hubbell*, the Court affirmed a lower court's ruling that an indictment was tainted and should be dismissed unless the prosecution was able to demonstrate that it did not obtain the indictment by use of knowledge gained from the defendant's immunized production of

When available, the privilege operates by imposing restrictions on the prosecution's use of previously compelled statements or testimony in the criminal case. Generally, a witness must have asserted the privilege when questioned in order to preserve a claim for relief in a criminal case.⁶⁰ If a witness responds to questions without asserting the privilege, and later is prosecuted, she usually loses the ability to contest the government's use of her answers.⁶¹ In some situations, however, including police interrogation of in-custody suspects, the privilege is self-executing, permitting suppression of a compelled statement in a criminal case even absent the previous assertion.⁶²

As the following discussion illustrates, the restrictions imposed on the prosecution in the second setting shed light on the meaning of the Fifth Amendment privilege. They make clear that although defendants, suspects, and witnesses can *assert* the privilege in the first setting, the government can *violate* it only in the second setting, that is, "in any criminal case." In other words, use of a compelled statement in a criminal case is a necessary

an "exhaustive litany of documents." 530 U.S. 27, 33 (2000) (quoting 167 F.3d 552, 581 (D.C. Cir. 1999)). In order to reach that result, the Supreme Court had to have determined that use of the immunized "act of production," which the privilege protects to the same extent that it safeguards testimonial communications, *see, e.g.*, *United States v. Doe*, 465 U.S. 605, 612-14 (1984), to secure an indictment before a grand jury can violate the privilege, *see Hubbell*, 530 U.S. at 44-46; *see also Weaver*, 40 F.3d at 535 (finding that use of a compelled statement in a grand jury proceeding to secure indictment violated the privilege and holding that "use or derivative use of a compelled statement at *any* criminal proceeding against the declarant violates that person's Fifth Amendment rights; use of the statement at trial is not required"). *But see United States v. Williams*, 504 U.S. 36, 49 (1992) (noting that "our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination 'is nevertheless valid'" (quoting *United States v. Calandra*, 414 U.S. 338, 346 (1974))).

60. On this point, the Court stated in *Minnesota v. Murphy*:

[A] witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. . . . [I]f he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege. . . .

465 U.S. at 429. Without some pressure beyond the demand of the subpoena, there is not sufficient "compulsion" to trigger the privilege. *Id.* at 427 ("The answers of [a subpoenaed] witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.").

61. *See United States v. Kordel*, 397 U.S. 1, 10 (1970) ("[The witness's] failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself."); *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 113 (1927) ("The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it.").

62. The Court has identified three circumstances in which the privilege is self-executing without an assertion: statements taken during custodial interrogation by police, situations in which an assertion of the privilege would be penalized, and federal occupational and excise taxes on gamblers. *See Murphy*, 465 U.S. at 429-40. In addition, legislatures can make immunity attach automatically when a witness testifies. *See, e.g.*, *United States v. Monia*, 317 U.S. 424, 428-29 (1943) (interpreting a provision of the Sherman Antitrust Act to confer transactional immunity on all subpoenaed grand jury witnesses who testify, even if the witness does not assert the privilege).

precondition for a violation of the privilege. The Court's immunity doctrine demonstrates this aspect of the privilege.

2. Immunity Doctrine

A valid assertion of the privilege does not foreclose government efforts to obtain testimony altogether. If authorized to do so by statute,⁶³ the government can obtain a court order granting immunity to a witness. Immunity statutes "have 'become part of our constitutional fabric'"⁶⁴ and "[t]he practice of exchanging silence for immunity is . . . presumably invulnerable, being apparently as old as the Fifth Amendment itself."⁶⁵ An immunized witness must answer questions despite an assertion of the privilege—even if the answers reveal her involvement in a crime—or face sanctions for contempt.⁶⁶ In exchange, an immunity order assures the witness that there will be restrictions on future efforts to prosecute her.

Although the Court once stated that the Fifth Amendment required that immunity guarantee a witness that she would not be prosecuted at all for matters that she described in her immunized testimony,⁶⁷ in 1972 the Court approved a more relaxed standard. In *Kastigar v. United States*,⁶⁸ the Court addressed the constitutionality of 18 U.S.C. § 6002, a statute that permitted federal prosecutors to overcome an assertion of the privilege by a grant of "use and derivative use immunity."⁶⁹ Such immunity would permit criminal

63. Although "[i]mmunity statutes . . . have historical roots deep in Anglo-American jurisprudence," *Kastigar v. United States*, 406 U.S. 441, 445 (1972), Congress did not enact a federal immunity statute until 1857, *see id.* at 446 n.13.

64. *Id.* at 447 (quoting *Ullmann v. United States*, 350 U.S. 422, 438 (1956)).

65. *United States v. Balsys*, 524 U.S. 666, 692 n.13 (1998). The Court has never questioned the view that some form of immunity is sufficient to overcome an assertion of the privilege. In *Kastigar*, it summarily dismissed a claim that "no immunity statute, however drawn, can afford a lawful basis for compelling incriminatory testimony." 406 U.S. at 448; *id.* ("We find no merit to this contention . . ."). Even Justice Brennan, an advocate of an expansive construction of the privilege, *see Piccirillo v. New York*, 400 U.S. 548, 562 (1971) (Brennan, J., dissenting from dismissal of certiorari) (contending that "absolute immunity . . . from prosecution" is necessary to overcome the privilege), was convinced that "the Constitution does not require so sweeping an interpretation [of the privilege] as completely to invalidate the immunity technique," *id.* at 563.

66. *See, e.g., Kastigar*, 406 U.S. at 453 (holding that a valid immunity grant was "sufficient to compel testimony over a claim of the privilege"); *Ullmann*, 350 U.S. at 425, 439 (affirming a contempt conviction for a witness who refused to answer questions despite an immunity grant).

67. *See Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892) ("We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.").

68. 406 U.S. 441.

69. *See* 18 U.S.C. § 6002 (1994) ("[N]o testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . ."). The Court described this protection as "use and derivative use immunity." *Kastigar*, 406 U.S. at 443. Others have referred to it as "use plus use-fruits immunity." *See, e.g., Akhil Reed Amar & Renée B. Lettow*,

prosecution of a witness for matters disclosed, but would bar use of both the testimony and any information derived directly or indirectly from it in the prosecution.⁷⁰ The *Kastigar* Court determined that a "prohibition on use and derivative use [of immunized testimony] secures a witness' Fifth Amendment privilege against infringement by the Federal Government,"⁷¹ because it leaves the witness "in substantially the same position as if the witness had claimed his privilege"⁷² and thus is "coextensive"⁷³ with privilege. As a result, the Court upheld § 6002.⁷⁴

Immunity doctrine teaches an important lesson about the privilege. It permits the government to compel answers to questions by use of an express threat of contempt, and does so despite an assertion of the privilege, so long as the government is willing to pay a price for the answers. In the now-prevalent use and derivative use immunity regimes, the cost is a guarantee that the statements and fruits thereof will not be used in a criminal prosecution. Immunity doctrine thus demonstrates that the privilege permits compulsion; it only imposes later restrictions on the government when it compels answers.⁷⁵ By doing so, it sheds light on that portion of the Fifth Amendment limiting the privilege's application to "any criminal case." Absent use of immunity-compelled testimony "in any criminal case" against the person who made the statement, there is no violation of the privilege.⁷⁶ A guarantee of later suppression satisfies the privilege, enabling the government to use compulsion to obtain statements. In other words, immunity doctrine demonstrates that the words "in any criminal case" serve to define the only setting in which the privilege can be violated.

Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857, 877 (1995).

70. The statute does permit prosecutors to use immunized testimony in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002. The Court has held that the prosecution may use all of a witness's immunized testimony in a perjury prosecution, not only that portion alleged to be false. See *United States v. Apfelbaum*, 445 U.S. 115, 117 (1980) ("[W]e hold that neither the statute [18 U.S.C. § 6002] nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements . . .").

71. 406 U.S. at 458.

72. *Id.* at 457 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964)).

73. *Id.* at 458.

74. *Id.* at 455-62; see also *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 474-76 (1972) (upholding a state statute requiring testimony in exchange for use and derivative use immunity).

75. See Larry J. Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 387 (1977) ("For many years the Supreme Court has held that compelling even self-incriminating testimony by a threat of imprisonment for contempt does not violate the fifth amendment, as long as immunity co-extensive with the scope of the privilege is granted.").

76. See Amar & Lettow, *supra* note 69, at 878 (describing the *Kastigar* rule as "prevent[ing] a suspect from being a witness against himself 'in any criminal case' by excluding his words and all things they lead to from the 'criminal case'").

3. *The Penalty Cases*

Although there may be a temptation to dismiss immunity doctrine as a narrow exception to a general rule that the privilege bars government compulsion to elicit testimonial evidence—an exception that exists only by virtue of advance statutory authorization and judicial approval of requests for immunity grants—the Court has given its blessing to other forms of government-employed compulsion. A series of decisions commonly known as the “penalty cases”⁷⁷ makes clear that the privilege leaves the government free to employ threats of severe economic penalties to compel statements so long as there are established restrictions on later use in criminal cases.

The first two penalty cases, *Garrity v. New Jersey*⁷⁸ and *Spevack v. Klein*,⁷⁹ which the Court decided on the same day, seemed to suggest otherwise. *Garrity* involved statements that New Jersey had compelled from police officers during a noncriminal judicial inquiry into the suspected fixing of traffic tickets.⁸⁰ Relying on a state statute, a court-appointed investigator had warned the suspect officers that they would forfeit their jobs if they did not answer his questions.⁸¹ After the suspects answered, criminal prosecutors used their statements to secure convictions.⁸² When the Supreme Court reviewed those convictions, it reversed them, determining that use of the compelled statements violated the Constitution.⁸³ Although the Court first relied on rationales other than the privilege to reach that conclusion,⁸⁴ it later came to view the *Garrity* decision as one in which the state had conferred de facto immunity by

77. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (referring to the “so-called ‘penalty’ cases”).

78. 385 U.S. 493 (1967).

79. 385 U.S. 511 (1967) (plurality opinion).

80. 385 U.S. at 494-95.

81. *Id.* at 494. The state statute authorized the penalties, which included loss of pension rights. *Id.* at 494 n.1.

82. *Id.* at 495.

83. *Id.* at 499-500.

84. The *Garrity* Court relied primarily on the Due Process Clause of the Fourteenth Amendment. *See id.* at 500 (“We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”). The Court also suggested that the threat to fire the officers if they did not answer questions was an unconstitutional condition on their privilege against self-incrimination. *See id.* (“There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”). For an explanation as to why the use of these rationales was problematic, see Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1342-55 (2001) (contending that the due process and unconstitutional conditions approaches do not explain the outcome in *Garrity*, but the privilege does).

compelling answers to questions.⁸⁵ Lower courts and commentators have agreed with that assessment of *Garrity*.⁸⁶ When public employees subject to questioning reasonably believe that they will lose their jobs if they refuse to answer official job-related questions, courts apply the *Garrity* doctrine, even in the absence of a forfeiture statute.⁸⁷

Spevack presented the flip side of the penalty situation—a refusal to answer despite compulsion. *Spevack* was an attorney under judicial investigation for misconduct. He asserted the privilege and refused to comply with a subpoena duces tecum demanding testimony and documents, despite facing disciplinary action for his refusal.⁸⁸ When he appealed his resulting disbarment, a plurality of the Court determined that the threat of disbarment constituted compulsion under the Fifth Amendment⁸⁹ and held

85. See *Lefkowitz v. Turley*, 414 U.S. 70, 82 (1973) (“It seems to us that the State intended to accomplish what *Garrity* specifically prohibited—to compel testimony that had not been immunized.”); see also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 270 n.4 (1983) (Marshall, J., concurring) (describing the forfeiture statute in *Garrity* as “allow[ing] the authorities to compel a public officer, under threat of removal from office, to provide incriminating testimony in exchange for immunity from use or derivative use of that testimony at a criminal proceeding”); *Maness v. Meyers*, 419 U.S. 449, 475 (1975) (White, J., concurring in the result) (noting that *Garrity* involved a witness’s “immunity from being incriminated by his responses to his interrogation”). Justice White, the author of *Lefkowitz v. Turley*, had first analogized police officers’ compelled statements to immunized testimony in his dissenting opinion in the companion case to *Garrity*, *Spevack v. Klein*, 385 U.S. 511, 530-32 (1967) (plurality opinion). Noting the Court’s decision in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), which held that a state grant of transactional immunity prevents federal prosecutors from using the immunized testimony or its fruits, he concluded that “[a] similar accommodation should be made” when public officials answer job-related questions under threat of discharge. *Spevack*, 385 U.S. at 532 (White, J., dissenting).

Although *Garrity* and the other defendants did not first assert the privilege, an action typically required to trigger its protection, the Court has since concluded that when assertion itself would be penalized, as was the case in *Garrity*, the protection is self-executing. See *supra* notes 60-62 and accompanying text.

86. See, e.g., *In re Grand Jury Subpoenas Dated December 7 & 8, 40 F.3d 1096*, 1102 (10th Cir. 1994) (“*Garrity*’s protection . . . acts to immunize these compelled statements . . .”); *United States v. Koon*, 34 F.3d 1416, 1433 n.13 (9th Cir. 1994) (discussing “immunity [that] attaches in the *Garrity* context”), *rev’d on other grounds*, 518 U.S. 81 (1996); *In re Fed. Grand Jury Proceedings*, 975 F.2d 1488, 1490 (11th Cir. 1992) (per curiam) (noting that *Garrity* “provides immunity to police officers who witness potentially criminal activity and are asked to provide information to police internal investigation personnel”); *United States v. Friedrich*, 842 F.2d 382, 396 (D.C. Cir. 1988) (holding that the defendant “enjoyed the use immunity conferred upon him as an FBI employee subject to an administrative investigation”); *Clymer*, *supra* note 84, at 1319-21, 1352-55 (contending that the compelled statements in *Garrity* resembled immunized testimony); *Ritchie*, *supra* note 75, at 388-89 (describing *Garrity* protection as “informal use immunity”).

87. See, e.g., *Friedrich*, 842 F.2d at 395 (finding that an objectively reasonable belief is sufficient to trigger *Garrity* protection); *United States v. Camacho*, 739 F. Supp. 1504, 1515 (S.D. Fla. 1990) (same); *People v. Sapp*, 934 P.2d 1367, 1373 (Colo. 1997) (en banc) (same).

88. *Spevack*, 385 U.S. at 512-13 (plurality opinion).

89. *Id.* at 516 (describing “[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood” as “powerful forms of compulsion to make a lawyer relinquish the privilege”).

that the state could not impose the penalty for an assertion of the privilege.⁹⁰

Together, the *Garrity* majority and the *Spevack* plurality suggested that the Constitution prohibited both economic compulsion to elicit testimonial evidence (*Spevack*) and later prosecutorial use of successfully compelled statements (*Garrity*). But the Court soon retreated from what *Spevack* appeared to mandate.⁹¹ Although it never revisited the specific holding in that case, the full Court later made clear that the Constitution permits the government to threaten job termination, loss of government contracts, and other significant economic disabilities, and to carry out those threats if government employees, contractors, or officials refuse to answer job-related questions.⁹² But, at the same time, the privilege prevents use of those sorts of threats to force a waiver of *Garrity* immunity.⁹³ Absent an invalid attempt to coerce such a waiver, a person subject to such threats is required

90. *Id.* at 514, 516. The Court also rejected the contention that the “required records doctrine,” *see* *Shapiro v. United States*, 335 U.S. 1, 16-20 (1948), permitted the state to compel production of the subpoenaed documents despite the privilege, *Spevack*, 385 U.S. at 516-19 (plurality opinion).

91. Four Justices joined the *Spevack* opinion. Justice Fortas, who provided the decisive fifth vote, made clear that he would have supported a different result had the subject of the questioning been “a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties.” *Spevack*, 385 U.S. at 519 (Fortas, J., concurring). The four *Spevack* dissenters also would have allowed the termination of an uncooperative public employee, *id.* at 528 (Harlan, J., dissenting); *id.* at 531 (White, J., dissenting), a point that the plurality did not contest, *id.* at 516 n.3 (noting that the Court did not reach the issue of a police officer questioned regarding his official conduct).

92. *See, e.g.,* *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (“Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.”); *Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973) (“[T]he State may insist that the architects involved in this case either respond to relevant inquiries about the performance of their [state] contracts or suffer cancellation of current relationships and disqualification from contracting with public agencies for an appropriate time in the future.”); *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation*, 392 U.S. 280, 283-84 (1968) (holding that the state could properly dismiss public employees for refusal to answer job-related questions so long as it did not also require waiver of immunity); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968) (“If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties . . . the privilege against self-incrimination would not have been a bar to his dismissal.”).

93. *See, e.g.,* *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (“In each of the so-called ‘penalty’ cases, the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege . . .”); *Cunningham*, 431 U.S. at 807-08 (holding that although the state could remove a political party officer for refusal to answer questions, it could not do so for refusal to waive immunity); *Turley*, 414 U.S. at 82-83 (holding that the state could not disqualify architects from state contracts because of a refusal to waive immunity); *Gardner*, 392 U.S. at 278 (determining that the state violated the privilege by discharging the police officer “not for failure to answer relevant questions about his official duties, but for refusal . . . to relinquish the protections of the privilege against self-incrimination”).

The Court has not determined whether the government can use a compelled statement in a later criminal prosecution if it succeeds in obtaining a threat-induced waiver of immunity. *See Gardner*, 392 U.S. at 278-79 (“We need not speculate whether, if appellant had executed the waiver of immunity in the circumstances, the effect of our subsequent decision in *Garrity* . . . would have been to nullify the effect of the waiver.”).

to answer questions or suffer the threatened economic sanctions, at least as long as existing doctrine makes clear that the compelled statements will be suppressed.

The penalty cases establish that the assurance of future suppression is both necessary and sufficient to permit the government to use economic threats to compel statements. An early penalty case, *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*,⁹⁴ demonstrated the need for such assurance. The case involved the job termination of fifteen employees of the New York City Department of Sanitation. Twelve had refused to answer questions during an administrative investigation. Three others had answered those questions but later refused to testify before a grand jury.⁹⁵ Although all of the employees had been warned that refusal to answer could result in the loss of their jobs, only the three who had been summoned to the grand jury were subjected to the additional threat that they would be fired if they refused to waive immunity.⁹⁶ As explained above, the "penalty case" doctrine would seem to permit the city to fire the uncooperative employees who had not been required to waive immunity.⁹⁷ But the Court determined that *all* of the job terminations were unconstitutional. It reasoned that *Garrity*, which established the doctrinal assurance of suppression, "had not been decided when these 12 petitioners [those who had not been required to waive immunity] were put to their hazardous choice."⁹⁸ Without the existence of an established doctrinal guarantee of de facto immunity, there was no reason to believe that any statements that those twelve employees made would be treated any differently than statements made after a waiver of immunity.⁹⁹

[I]f New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case

94. 392 U.S. 280.

95. *Id.* at 281-82.

96. *Id.* at 282-83.

97. See *supra* notes 92-93 and accompanying text (explaining that states can fire employees who refuse to answer job-related questions so long as there is no demand that employees waive immunity regarding their answers).

98. 392 U.S. at 284.

99. This requirement of assured future suppression also explains the outcome in *Spevack*. Like the employees in *Sanitation Men*, Spevack could not have known that his compelled answers were inadmissible because the Court had not yet decided *Garrity*, in which it established the de facto immunity in such penalty situations. As a result, the government could not punish Spevack's refusal to comply with the subpoena. See *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 93, 206-10 (1968) (describing *Spevack* as a transition from the pre-*Garrity* to post-*Garrity* world, and explaining that Spevack could not be punished for assertion of the privilege because he did not know that his statements would be excluded from a criminal prosecution).

would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against the petitioners as well as the [New York job forfeiture provision] was to present them with a choice between surrendering their constitutional rights or their jobs.¹⁰⁰

Later penalty cases, involving events after the *Garrity* rule had become established doctrine,¹⁰¹ made clear that *Garrity*'s assurance of suppression is sufficient to allow the government to employ economic compulsion to obtain statements. As noted above, those decisions permitted the government to threaten job termination for refusals to answer questions and to make good on those threats.¹⁰² In short, if established doctrine guarantees that some sort of immunity will attach, the government is free to compel answers. If established doctrine does not guarantee suppression of the resulting statement, the privilege forbids the government from penalizing a refusal to answer questions.¹⁰³ Thus, like immunity doctrine, the penalty

100. *Id.* at 284. Elsewhere, the Court has made clear that a mere prediction of future suppression is inadequate. See *United States v. Balsys*, 524 U.S. 666, 683 n.8 (1998) (noting that "the prediction that a court in a future criminal prosecution would be obligated to protect against evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination"); *United States v. Doe*, 465 U.S. 605, 616 (1984) (holding that government assurance that it would not use the act of production against the subpoena recipient in a later criminal prosecution was insufficient to overcome assertion of the privilege); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983) (rejecting the view that a prediction of future suppression in criminal prosecution was sufficient to compel answers). Professor Donald A. Dripps alerted me to the relevance of *Doe* in this context.

101. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973).

102. See *supra* note 92 and accompanying text.

103. On this point, the Court has stated:

[G]iven adequate immunity, the State may plainly insist that employees either answer questions under oath about performance of their job or suffer the loss of employment. . . . But the State may not insist that [employees or contractors] waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.

Turley, 414 U.S. at 84-85. Other than reference to the "fruits of the interrogation" in that passage, the Court never has elaborated on the scope of the *Garrity* exclusionary rule by explaining what, if anything, courts must suppress beyond the compelled statement itself in the prosecution's case-in-chief. For a discussion of the reach of *Garrity* immunity, see Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope*, 72 WASH. U. L.Q. 1603, 1693-700 (1994) [hereinafter Bloch, *Compelled Statements*] (applying proposed models for determining the proper scope of the Fifth Amendment exclusionary rule in the *Garrity* context); Kate E. Bloch, *Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements*, 1992 U. ILL. L. REV. 625, 639 ("Precisely what 'exempt from use' meant [in *Garrity*] or means today is both complex and open to debate."); Clymer, *supra* note 84, at 1327-28 (describing appellate courts' treatment of *Garrity*-immunized

cases demonstrate that the Fifth Amendment privilege does not prohibit government compulsion to elicit statements, even those involving admissions of criminal conduct. The privilege prohibits only the later use of those statements in a criminal prosecution.¹⁰⁴ Other decisions, in which the Supreme Court either did not condemn or permitted government compulsion to obtain statements, and held or suggested that there would be restrictions on later use in criminal prosecutions, are consistent with this interpretation of the privilege.¹⁰⁵

4. *Purposes of the Privilege*

Although the Supreme Court's application of the privilege in the immunity and penalty contexts supports the view that it governs admissibility only, the Court has used expansive language when attempting to articulate a rationale for the privilege. In doing so, it has raised the possibility that the privilege speaks to compulsion as well as use. The Court provided its most comprehensive explanation of the "policies" behind the privilege in *Murphy v. Waterfront Commission*:

statements as the equivalent of formally immunized statements); and *id.* at 1365-69 (contending that *Garrity* immunity should afford less protection than that which formally immunized testimony receives).

104. Justice Powell, sitting by designation after his retirement, reached this conclusion. See *Wiley v. Doory*, 14 F.3d 993, 996 (4th Cir. 1994) ("[L]anguage in [the penalty cases] suggests that the right against self-incrimination is not violated by the mere compulsion of statements, without a compelled waiver of the Fifth Amendment privilege or the use of the compelled statements against the maker in a criminal proceeding."); see also *Ritchie*, *supra* note 75, at 388-91 (explaining why the penalty cases support the view that compulsion does not violate the privilege so long as the use of resulting statements is prohibited).

105. See, e.g., *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 561 (1990) (holding that the state could compel a parent to produce a child despite testimonial aspects of the production and suggesting that "[t]he same custodial role that limited the [parent's] ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony"); *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (noting that "[t]he issue in this case is whether the Fifth Amendment right that Murphy enjoyed would be violated by the admission into evidence at his trial for another crime of the prior statements" that he alleged had been compelled by a threat of revocation of his probation (emphasis added)); *id.* at 436 n.7 ("[A] State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination."); *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) (holding that a prison inmate can be compelled to answer questions if the answers receive sufficient immunity); see also *Murphy*, 465 U.S. at 442 n.3 (Marshall, J., dissenting) ("A majority of the Court . . . adheres to the view that the constitutional prohibition is not violated as long as the witness is accorded immunity against the use, in a criminal prosecution, of his testimony or the fruits thereof."); *Ritchie*, *supra* note 75, at 391 & n.46 (describing additional cases "that lend some support to [the] proposition" that the Court has rejected the notion "that the act of compulsion is the evil [that the privilege] addressed"); *Stone*, *supra* note 23, at 139 ("[T]he [Baxter] Court's conclusion that the fact of interrogation without compliance with *Miranda* is not itself unlawful seems to assume that the privilege is violated only when compelled evidence is actually used against the defendant in a criminal case. The mere act of compelling the statement is not unconstitutional.").

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often a "protection to the innocent."¹⁰⁶

To fully serve all of these objectives, the privilege would have to bar both efforts to compel statements from suspects *and* the use of any compelled statements. But, even as it articulated those policies, the *Murphy* Court seemed to disown them, acknowledging "that 'the law and the lawyers . . . have never made up their minds just what [the privilege] is supposed to do or just whom it is intended to protect.'"¹⁰⁷ Two terms later, and only a week after the *Miranda* decision, the Court refused to rely on the language in *Murphy* to define the reach of the privilege, concluding that "the privilege has never been given the full scope which the values it helps to protect suggest."¹⁰⁸ Similarly, the Court more recently recognized that "[w]hile [*Murphy*'s] list does indeed catalog aspirations furthered by the [Self-Incrimination] Clause, its discussion does not even purport to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope."¹⁰⁹ The Court's reluctance to rely on the language in *Murphy* to interpret the privilege or decide cases comports with the scholarly criticism that the passage has received.¹¹⁰

106. 378 U.S. 52, 55 (1964) (citations omitted).

107. *Id.* at 56 n.5 (quoting Harry Kalven, *Invoking the Fifth Amendment—Some Legal and Impractical Considerations*, 9 BULL. ATOM. SCI. 181, 182 (1953)).

108. *Schmerber v. California*, 384 U.S. 757, 762 (1966).

109. *United States v. Balsys*, 524 U.S. 666, 691 (1998) ("[W]e think there would be sound reasons to stop short of resting an expansion of the [Self-Incrimination] Clause's scope on the highly general statements of policy expressed in the . . . quotation from *Murphy*.").

110. The definitive attack on the *Murphy* policies is found in Friendly, *supra* note 39, at 679, 685-95 (discussing and dismissing most of the *Murphy* Court's policies as having been repudiated or abandoned elsewhere by the Court, or as "mere rhetoric," or conclusory, and noting that "eloquent phrases have been accepted as a substitute for thorough thought" in treatments of the privilege). Even a stalwart defender of the privilege concedes that the laundry list of policies in *Murphy* is unpersuasive. Schulhofer, *supra* note 47, at 317 (noting that concerns expressed in *Murphy* "don't stand up to analysis" and crediting Friendly with "essentially demolish[ing] one by one each of the possible reasons for the privilege").

The Supreme Court's other expressions of policies supporting the privilege are equally broad and unhelpful in determining whether the privilege bars compulsion or only use of incriminating statements.¹¹¹ Scholars have attempted to offer more refined justifications than those found in *Murphy*, often focusing on privacy, autonomy, and anticruelty concerns, but their efforts cannot be squared with the prevailing privilege doctrine.¹¹² Indeed, the privilege freely permits the government to compel non-self-incriminating statements, no matter how private the matter, how unwilling the witness, or how unpleasant or painful it is for her to give the testimony. Even when it applies, the privilege can be overcome by a grant of immunity.

Thus, any normative justification for the privilege must take into account the limited scope of its coverage (potentially self-incriminating statements only) and the government's ability to override it by use of express or de facto immunity. Although it is clear that the Court interprets the privilege as a bulwark preventing the government from using a person's forced testimonial communications to convict him of a crime,¹¹³ it is not

111. For example, the *Miranda* Court offered a summary of the *Murphy* policies:

All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord the dignity and integrity of its citizens. To maintain a “fair state-individual balance,” to require the government “to shoulder the entire load,” to respect the inviolability of the human personality, our accusatory system of justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right to “remain silent unless he chooses to speak in the unfettered exercise of his own will.”

Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citations omitted).

112. The best treatment of the standard explanations for the privilege and their deficiencies is David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986). Dolinko fairly describes the leading systemic and individual rationales for the privilege and persuasively demonstrates how the privilege, as the Court construes it, does not support any of those rationales. *Id.*; see also sources cited *infra* note 137. For efforts to explain the privilege on other grounds, see Amar & Lettow, *supra* note 69 (proposing a reliability rationale for the privilege); and William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988) (proposing that without the privilege, there would be grounds for recognizing an excuse for perjurious, self-exculpatory testimony and concluding that the privilege is a better alternative). Although the reliability rationale that Amar and Lettow offer has some appeal as a normative matter, they acknowledge that it is at odds with prevailing doctrine, which requires suppression of reliable evidentiary fruits of compelled statements, thus sweeping more broadly than their rationale. Amar & Lettow, *supra* note 69, at 877-89. Stuntz's effort to explain the privilege rests on the questionable proposition that courts would excuse self-protective perjury if there were no privilege. In an analogous setting, however, the Supreme Court refused to excuse false denials of culpability by persons questioned by federal law enforcement agents. See *Brogan v. United States*, 522 U.S. 398 (1998) (rejecting the “exculpatory no” defense in a prosecution for violation of 18 U.S.C. § 1001, the federal false statement statute).

113. See, e.g., *Doe v. United States*, 487 U.S. 201, 211 (1988) (“It is the ‘extortion of information from the accused,’ the attempt to force him ‘to disclose the contents of his own mind,’ that implicates the Self-Incrimination Clause.” (citations omitted)); *Schmerber*, 384 U.S. at 761 (“We hold that the privilege protects an accused only from being compelled to testify against

evident why prosecutorial use of such evidence is offensive. A thorough evaluation of efforts to explain the privilege is beyond the scope of this Article. Similarly, this Article does not attempt to offer a normative vision for the privilege. The more modest objective here is to urge doctrinal consistency, whatever view the Court ultimately may develop to explain its treatment of the privilege. For present purposes, it is sufficient to note that the Court's reluctance to rely on the *Murphy* rationales demonstrates that they should not be taken as persuasive evidence that the Court views the privilege as either a prohibition on compulsion during questioning or a restriction on the admissibility of compelled statements.

5. *The Supreme Court's Description of the Privilege*

To be sure, the Supreme Court occasionally has used language suggesting that government compulsion itself violates the privilege, without regard to later use of any resulting statements.¹¹⁴ But, those comments have been made in passing, rather than as part of a directed effort to describe the manner in which the privilege operates. In contrast, when the Court has focused its attention on the operation of the Fifth Amendment, it has made clear that it is the use of compelled statements, not their acquisition, that the privilege prohibits. Although not essential to its decision, a five-member majority of the Supreme Court made that point in *United States v. Verdugo-Urquidez*:¹¹⁵ "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."¹¹⁶

himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . .").

114. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 436 (1984) (suggesting that an effort to compel an answer from a probationer by threatening revocation would be an "impermissible step"); *United States v. Blue*, 384 U.S. 251, 255 (1966) (referring to the possibility that "the Government did acquire incriminating evidence in violation of the Fifth Amendment" (emphasis added)); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57 n.6 (1964) ("The Government may not use compulsion to elicit self-incriminating statements . . .").

115. 494 U.S. 259 (1990). *Verdugo-Urquidez* involved a claim by the defendant, a Mexican citizen, that the Fourth Amendment applied to a search that United States law enforcement agents conducted at his residence in Mexico. *Id.* at 262. After noting that the lower court, which had agreed with the defendant, had relied in part on authority extending the reach of the Fifth Amendment to law enforcement activity abroad, the Court explained that the Fourth Amendment "operates in a different manner than the Fifth Amendment," and determined that the former had no application in the case. *Id.* at 263-64.

116. *Id.* at 264 (citations omitted); see also *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (discussing "the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from the compelled testimony" (emphasis added)); *United States v. Balsys*, 524 U.S. 666, 691-92 n.12 (1998) (quoting the full passage from *Verdugo-Urquidez*); *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (reiterating the *Verdugo-Urquidez* Court's description of the privilege as a "trial right"); *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) ("The Fifth Amendment prohibits use by the prosecution in its case in chief only of

The Court confirmed this understanding of the privilege in *United States v. Balsys*.¹¹⁷ Noting that unlike Fourth Amendment doctrine, which treats “breaches of privacy [as] complete at the moment of illicit intrusion, whatever use may or may not later be made of their fruits . . . [t]he Fifth Amendment . . . offers no such degree of protection.”¹¹⁸ Rather, “[i]f the Government is ready to provide the requisite use and derivative use immunity, the protection goes no further: no violation of personality is recognized and no claim of privilege will avail.”¹¹⁹ The Court is not alone in reaching this conclusion. A host of scholars has expressed the view that the Fifth Amendment privilege is an exclusionary rule, one violated only when a compelled statement is used in a criminal case.¹²⁰

This does not mean that the Constitution freely permits government coercion to elicit statements. It simply means that the *Fifth Amendment privilege* addresses government use of compulsion to obtain self-incriminatory testimony and statements only by imposing limits on use in criminal cases.¹²¹ Due process also plays an indispensable role in controlling police interrogation. Long before the Court had placed significant emphasis on the privilege as a mechanism for regulating police questioning, it employed due process to address offensive interrogation

compelled testimony.” (emphasis omitted)); *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) (“All the Fifth Amendment [privilege] forbids is the introduction of coerced statements at trial.”).

117. 524 U.S. 666. In *Balsys*, the Court held that a person cannot validly assert the Fifth Amendment privilege based on fear of foreign prosecution, *id.* at 669, at least absent evidence that there is substantial cooperation between the questioning sovereign and the foreign government, *id.* at 698-700.

118. *Id.* at 692.

119. *Id.* (citations omitted).

120. See, e.g., Akhil Reed Amar & Renée B. Lettow, *Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar*, 93 MICH. L. REV. 1011, 1011 (1995) (contending that the privilege is not violated unless compelled testimony is “introduced as evidence in a criminal case” and that, otherwise, the person subject to compulsion “has never been made an involuntary witness against himself in a criminal case”); Bloch, *Compelled Statements*, *supra* note 103, at 1641-42 (“There is no constitutional violation in the compulsion.”); Alan M. Dershowitz & John H. Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1214 (1971) (noting that the Fifth Amendment “is an exclusionary rule—and a constitutionally created one”); Gardner, *supra* note 25, at 1309 (“[T]he privilege against self-incrimination [is] nothing but a variety of the exclusionary rule.”); Klein, *supra* note 4, at 465 (noting that “the Government can compel statements in many circumstances; it simply cannot use them against the speaker in a criminal proceeding”); Loewy, *supra* note 25, at 921 (“[U]nlike fourth amendment rights, fifth amendment rights are not violated unless and until the statement is used against the person making it”); Ritchie, *supra* note 75, at 393 (“[P]olice torture of a defendant would not violate the fifth amendment privilege if the resulting confession were not used against him”); see also *United States v. Hampton*, 775 F.2d 1479, 1486 n.35 (11th Cir. 1985) (“The Fifth Amendment, after all, is by its own terms an exclusionary rule”); *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976) (describing the Fifth Amendment as an “exclusionary rule”).

121. This is hardly surprising given that some types of compulsion that trigger the privilege, such as court-imposed contempt sanctions, are perfectly legal means of securing testimony.

practices.¹²² While the relationship between the due process approach and the privilege remains less than clear,¹²³ due process almost certainly prohibits improper police use of physical force, threats of force, and extreme forms of psychological pressure during interrogation, at least when such conduct “shocks the conscience,” without regard to later admission of resulting statements in a criminal case.¹²⁴ Although such conduct, as well as

122. The Court first held that the Due Process Clause of the Fourteenth Amendment requires suppression of a coerced confession in *Brown v. Mississippi*, 297 U.S. 278 (1936), which reversed a conviction based on a torture-induced confession. From then until the Court held in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the privilege applies to the states as well as to the federal government, the Court employed due process as the sole means of determining whether confessions resulting in convictions had been voluntary. See *Dickerson v. United States*, 530 U.S. 428, 433-34 (2000) (describing the Court's use of due process in “some 30 different cases” between 1936 and 1964). See generally Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195 (1996) (describing and analyzing the Court's due process decisions). The due process approach survived *Miranda* and exists as an independent constitutional constraint. See *Dickerson*, 530 U.S. at 434 (“We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily.”).

123. Before 1964, the Court treated the privilege and the due process rule governing the admissibility of confessions as distinct doctrines. To be sure, the Court once had employed the privilege to suppress a suspect's postarrest statement in a federal trial. See *Bram v. United States*, 168 U.S. 532 (1897). Otherwise, the Court had relied primarily on due process to analyze confessions. See, e.g., *Dickerson*, 530 U.S. at 433 (“While *Bram* was decided before [the due process confession cases], for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process.”). Because most of the confession cases came to the Court from the states and, until *Malloy v. Hogan*, 378 U.S. 1, the privilege did not apply to the states, due process was then the only mechanism that the Court had available to regulate state and local interrogation practices. Although best known for its holding that the Due Process Clause incorporates the privilege, making it applicable to the states, see *supra* note 37, *Malloy* also held that the privilege set the standard for the introduction of confessions into evidence in state as well as federal courts, see *Malloy*, 378 U.S. at 7 (“[T]oday the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions [under the Fifth Amendment privilege].”); see also *infra* notes 132-137 (discussing *Malloy*).

But, notwithstanding *Malloy*, the Court continues to employ due process, not the privilege, when determining whether a confession is involuntary. See *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (noting that despite the availability of the privilege, the Court “has retained [a] due process focus” to address coerced confessions); *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (“[E]ven after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, and is binding on the States, the Court has continued to measure confessions against the requirements of due process.” (citations omitted)).

124. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (discussing the Court's repeated adherence to the view that government conduct “that shocks the conscience” violates due process); *Rochin v. California*, 342 U.S. 165, 172 (1951) (holding that police conduct “close to the rack and the screw” shocks the conscience and thus violates due process).

Although the Court also has made clear that the use of coerced confessions in criminal cases can violate due process, see, e.g., *Lisbena v. California*, 314 U.S. 219, 236 (1941) (“The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence, whether true or false.”), there is considerable support for the proposition that the taking of a coerced confession alone can violate due process as well, see, e.g., *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (“[A] confession obtained by police through the use of threats is violative of due process”); *Williams v. United States*, 341 U.S. 97, 101 (1951) (“But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution.”); *Weaver v. Brenner*, 40 F.3d 527, 536 (2d Cir. 1994) (finding that the “the constitutional violation is complete when the offending official behavior occurs, and the refusal to admit at trial

the perfectly legal forms of compulsion described above—threats of a contempt sanction or economic penalties—also triggers the privilege, only due process imposes direct restraints on government actors seeking to obtain statements.¹²⁵

The *Miranda* rules rest on the privilege, however, not due process.¹²⁶ And, although police failure to comply with the *Miranda* rules, either by not giving warnings or by disregarding a suspect's assertion of rights, is "a significant factor" when determining whether police interrogation has run afoul of due process,¹²⁷ noncompliance with those rules, standing alone, does not violate due process.¹²⁸ As a result, unless the *Miranda* Court construed the privilege to operate in a new and different way in order to announce the *Miranda* rules, those rules, like the privilege, impose no direct obligation on police.

statements made as a result of coercion is merely a corrective way in which a court penalizes conduct that violates the Constitution"); *Cooper v. Dupnik*, 963 F.2d 1220, 1244-45 (9th Cir. (en banc) ("The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself."), *cert. denied*, 506 U.S. 953 (1992); *Rex v. Teeple*, 753 F.2d 840, 843 (10th Cir. 1985) (permitting a lawsuit alleging a due process violation to proceed despite the fact that the coerced statement was not used at trial because "[e]xtracting an involuntary confession by coercion is a due process violation"). See generally *Loewy*, *supra* note 25, at 934 (contending that although admission of a coerced confession violates due process, "some coerced confessions are also obtained unconstitutionally . . . regardless of whether any confession is used").

125. See *Ritchie*, *supra* note 75, at 392 ("Even if the privilege is not interpreted to prohibit the act of compulsion, the due process clause, of course, limits the type of coercive conduct in which the government may engage . . .").

126. See David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958, 961 (2001) ("*Miranda* is based exclusively on the Self-Incrimination Clause of the Fifth Amendment."). Although Professor George Thomas has argued that *Miranda* is better understood as a case involving a due-process-based notice requirement than Fifth Amendment compulsion, see George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081 (2001), the Court has not adopted that view. For criticism of the Thomas position, see Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567 (2001).

127. *Davis v. North Carolina*, 384 U.S. 737, 741 (1966) (holding that the failure of police to advise an in-custody suspect of his rights "gives added weight to the other circumstances . . . which made his confessions involuntary"); see also *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993) (noting that "failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation" are circumstances bearing on whether there is a due process violation); *Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978) (finding a due process violation in part because the detective failed to terminate questioning when the suspect repeatedly requested counsel).

128. See *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (recognizing that in cases in which police did not give warnings and secure waivers before questioning, "we might not find the defendants' statements to have been involuntary in traditional terms"). The decisions in *Harris v. New York*, 401 U.S. 222 (1971), and *Oregon v. Hass*, 420 U.S. 714 (1975), demonstrate this rule. Although statements that police obtain by violating a defendant's due process rights are not admissible to impeach him at trial, see *Mincey*, 437 U.S. at 396-402, *Harris* and *Hass* permitted impeachment use of statements that police obtained after giving incomplete *Miranda* warnings, see *Harris*, 401 U.S. at 225-26, and by questioning a suspect who had asked for counsel, see *Hass*, 420 U.S. at 723-24, even though the violations of the *Miranda* rules required suppression of the statements in the prosecution's case-in-chief.

B. *Miranda as a Rule of Admissibility*

1. *From the Privilege to the Miranda Rules*

The Warren Court's use of the privilege against compulsory self-incrimination to create a set of "guidelines"¹²⁹ describing specific warnings to be given and waivers to be obtained before police question in-custody suspects, and empowering those suspects to terminate questioning, required a number of creative and controversial steps.¹³⁰ Although the Court had taken some of those steps before *Miranda*, the *Miranda* opinion did much of the work. Of principal concern here is whether any of those steps, or any other aspect of the "*Miranda* revolution,"¹³¹ involved interpretation of the privilege to do something that it does not do elsewhere—directly prohibit government compulsion to elicit statements. Examination of each step reveals that the Court did not need to, and did not, so interpret the privilege in order to formulate the *Miranda* rules.

First, in order to employ the privilege as a means of governing interrogation by state and local police, the Court had to determine that it applies to the states, that is, that the Due Process Clause of the Fourteenth Amendment "incorporates" its protections as "the very essence of a scheme of ordered liberty."¹³² The Court reached this conclusion two terms before *Miranda* in *Malloy v. Hogan*.¹³³ That holding was no less controversial than some of the conclusions that the *Miranda* Court later would reach.¹³⁴ In a number of earlier decisions, the Court had determined that the privilege did not apply to the states,¹³⁵ a view that it reiterated shortly before *Malloy*.¹³⁶

129. See *Miranda*, 384 U.S. at 441-42 (referring to the rules as "guidelines").

130. See Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 436-55 (describing the "conceptually distinct steps").

131. Both defenders and critics have characterized *Miranda* as a revolution. See, e.g., KAMISAR ET AL., *supra* note 29, at 471 (including a casebook section on "The *Miranda* 'Revolution'"); Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 544 (1998) (referring to the "*Miranda* revolution").

132. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (stating the standard for incorporation of the provisions of the Bill of Rights), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

133. 378 U.S. 1, 3 (1964) ("We hold that the Fourteenth Amendment guaranteed the petitioner [a witness in state court] the protection for the Fifth Amendment's privilege against self-incrimination . . .").

134. See, e.g., JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 120-23 (1993) (describing the position against full incorporation of the privilege); Stephen J. Schulhofer, *Miranda*, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism, 99 MICH. L. REV. 941, 948 (2001) (describing *Malloy*'s incorporation of the privilege as binding on the states as a "revolutionary step").

135. See, e.g., *Adamson v. California*, 332 U.S. 46, 54 (1947) ("[T]he due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment."), *overruled by Malloy*, 378 U.S. 1; *Twining v. New Jersey*, 211 U.S. 78, 110 (1908)

That conclusion was consistent with the views of a host of Fifth Amendment scholars who have questioned whether the privilege, as the Court interprets it, plays a meaningful role in the criminal justice system.¹³⁷

Second, the Court had to conclude that the privilege operates during police interrogation. Here, too, the Court had laid groundwork before *Miranda*. In *Bram v. United States*,¹³⁸ an 1897 decision involving a federal prosecution for murder, the Court had determined that the privilege required the suppression of a statement made during custodial interrogation, because the detective who questioned Bram had made statements that the Court interpreted as promises of leniency.¹³⁹ Critics complained that *Bram* had misapplied the privilege, by erroneously extending it to a situation in which there had been no contempt threat to compel answers, which, these critics claimed, was a precondition for its application.¹⁴⁰ Despite the

("The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it."), *overruled by Malloy*, 378 U.S. 1; *Twining*, 211 U.S. at 114 ("[W]e think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."); *see also Palko*, 302 U.S. at 326 (stating in dicta that "[j]ustice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry").

136. *See* *Cohen v. Hurley*, 366 U.S. 117, 127-28 (1961) (rejecting, in dicta, the claim that due process requires application of the privilege to the states), *overruled by Malloy*, 378 U.S. 1, and *Spevack v. Klein*, 385 U.S. 511 (1967) (plurality opinion).

137. *See, e.g., Dolinko, supra* note 112, at 1068 (contending that "neither appeal to the goals of the criminal justice system nor invocation of broad notions of human rights can justify the privilege against self-incrimination"); *Dripps, supra* note 39, at 711-18 (concluding that "the privilege against self-incrimination is a constitutional mistake" that encourages abusive police practices by shifting interrogation from the courtroom to the station house); *Friendly, supra* note 39, at 680 (criticizing the Court's broad interpretation of the privilege, which "not only stands in the way of convictions but often prevents restitution to the victim," and contending that "[i]n contrast to the rare case where it may protect an innocent person, it often may do the contrary"); *Stuntz, supra* note 112, at 1228 ("It is probably fair to say that most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory."); *id.* at 1232-39 (explaining that the privacy, autonomy, and avoidance of cruel choices rationales do not explain the privilege doctrine). *But see Schulhofer, supra* note 47, at 325-33 (defending the privilege as necessary to ensure that criminal defendants have unfettered choice when deciding whether to testify at trial). Judge Friendly listed Professors John Wigmore, E.S. Corwin, Roscoe Pound, Edmund M. Morgan, Charles T. McCormick, and Lewis Mayers as scholars who had expressed reservations about broad construction of the privilege. *Friendly, supra* note 39, at 672-74. Professor Dripps added the names of "Justices Holmes, Cardozo, Brandeis, Stone, Hughes, Black, Frankfurter, and the Second Justice Harlan" as "great jurists who at one time or another classified the privilege as something less than essential to fundamental fairness." *Dripps, supra* note 39, at 728-29. Dripps has called for the privilege to be "disincorporated." *See id.* at 728-34 (contending that the Court should overturn *Malloy*).

138. 168 U.S. 532 (1897).

139. *Id.* at 565.

140. *See, e.g., GRANO, supra* note 134, at 123-31 (describing criticism of *Bram*); *Friendly, supra* note 39, at 709 ("Until a few years ago it was widely believed that the self-incrimination clause did not apply at this stage [police interrogation]. The privilege, it was said, protects against compelled testimony, and the police have no legal power to compel."). Wigmore was the leading critic of *Bram*'s extension of the privilege. *See, e.g., 8 JOHN H. WIGMORE, EVIDENCE* § 2266 (3d ed. 1940) ("[T]he privilege covers only statements made in court under process as a witness . . .").

criticism, that aspect of *Bram* lingered, if barely, as a viable precedent until the Court revived it in the 1960s.¹⁴¹ In *Malloy*, the Court supported its view that the privilege governs the admissibility of police-obtained confessions in state courts by endorsing *Bram*'s conclusion that it did the same in federal cases.¹⁴² But, unlike *Bram*, *Malloy* involved a statement that had been compelled by a contempt threat, not police conduct, rendering the use to which it put *Bram* merely dicta.¹⁴³ Thus, it was more significant when the *Miranda* Court later relied on *Bram* to hold that the Fifth Amendment privilege applies to police efforts to elicit statements during custodial interrogation.¹⁴⁴ Although controversial at the time,¹⁴⁵ this facet of *Miranda* now appears well accepted.¹⁴⁶

Third, the Court had to equate the general pressure to answer questions during custodial interrogation with the sort of explicit compulsion previously deemed necessary to trigger the privilege. Here, the *Miranda*

Writing for the majority in *Stein v. New York*, Justice Jackson relied on Wigmore to denigrate *Bram*: "It is not a rock upon which to build constitutional doctrine. According to Wigmore, this decision represents 'the height of absurdity in misapplication of the law,' and has been discredited by subsequent cases." 346 U.S. 156, 191 n.35 (1953) (citation omitted); see also *Michigan v. Tucker*, 417 U.S. 433, 441-42 & n.16 (1971) (describing and quoting Wigmore's criticism of the use of the privilege to suppress confessions). For a defense of *Bram* and a rejection of the Wigmore position, see Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 529-50 (1992).

141. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 433 (2000) ("While *Bram* was decided before [the due process confession cases], for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process."); Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 453 n.19 (1964) ("[T]he impact of [*Bram*'s] self-incrimination theory was not felt until *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Escobedo v. Illinois*, 378 U.S. 478 (1964)."); Herman, *supra* note 140, at 529-30 ("After *Bram*, however, the Court did not rely on the privilege, and it fell into disuse as a restriction on police interrogation."); Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 436-37 (noting that *Bram* was "promptly forgotten"). See generally Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 4-12 (1986) (discussing *Bram* and cases following it).

142. See *Malloy*, 378 U.S. at 6-7 (citing *Bram* and declaring that "today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897"); Herman, *supra* note 140, at 530 (describing *Malloy* as "[t]he beginning of the end" of the debate in Supreme Court cases regarding *Bram*'s reliance on the privilege).

143. *Malloy*, 378 U.S. at 3.

144. After describing *Bram* and later decisions, the *Miranda* Court concluded that "[t]oday, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); see also Herman, *supra* note 140, at 530 (describing *Miranda* as "the end of the end" of the debate over *Bram*).

145. See, e.g., *Miranda*, 384 U.S. at 510 (Harlan, J., dissenting) (finding "no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station" and noting that "[h]istorically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions"); *id.* at 527-28 (White, J., dissenting) (contending that *Bram* "finds scant support in either the English or American authorities").

146. See *supra* notes 51-52 and accompanying text (describing the broad range of settings in which the privilege operates).

Court broke new ground. In *Bram*, an implied promise of leniency had contributed to the compulsion.¹⁴⁷ In contrast, the *Miranda* Court concluded from its assessment of police interrogation manuals¹⁴⁸ that even absent any physical violence, threats, or promises, “the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”¹⁴⁹ Although that passage, as well as other portions of the opinion,¹⁵⁰ indicated that the *Miranda* Court had determined that custodial interrogation alone is *always* sufficiently compelling to trigger the privilege,¹⁵¹ the Court later would retreat from that position. Instead, it would maintain that violations of *Miranda* do not necessarily constitute violations of the Constitution¹⁵² and would characterize *Miranda* as a “prophylactic rule,” one that created an irrebuttable presumption of compulsion when police elicit statements during custodial interrogation.¹⁵³

147. See *Bram v. United States*, 168 U.S. 532, 565 (1897).

148. See *Miranda*, 384 U.S. at 448-55 (discussing and quoting from selected police interrogation manuals).

149. *Id.* at 467. The Court later would elaborate on this critical aspect of the *Miranda* decision:

Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers’ will and to confess [T]he coercion inherent in custodial interrogation derives in large measure from an interrogator’s insinuations that the interrogation will continue until a confession is obtained.

Minnesota v. Murphy, 465 U.S. 420, 433 (1984).

150. See, e.g., *Miranda*, 384 U.S. at 461 (“As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.”).

151. See, e.g., Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 447 (“The Court held that the briefest period of interrogation necessarily will involve compulsion.” (emphasis omitted)). But see *id.* at 448, 453 (conceding that it is “conceivable” that an interrogation would not involve compulsion).

152. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (“The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.”); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (“The Court recognized that these procedural safeguards [described in *Miranda*] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”).

153. See *Elstad*, 470 U.S. at 307 (describing the “*Miranda* presumption” of compulsion as “irrebuttable”); *id.* at 317 (“When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State’s case in chief.”); *Tucker*, 417 U.S. at 439 (describing the *Miranda* rules as “prophylactic”); Dripps, *supra* note 23, at 19 (“In effect, compulsion is presumed from the facts of custody and questioning.”). See generally Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001) (defining a “constitutional prophylactic rule” as “a judicially-created doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or ‘true’ federal constitutional rule is applicable” that “may be triggered by less than a showing that the explicit rule was violated, but [that] provides approximately the same result as a showing that the explicit rule was violated”).

Fourth, the *Miranda* Court crafted its now-famous “compromise.”¹⁵⁴ If the privilege applies to police, questioning and statements made during custodial interrogation are (or, as the Court has held more recently, must be presumed to be) compelled, the privilege would seem to require suppression. But, to the dismay of some,¹⁵⁵ the Court determined that police could dispel the compulsion.¹⁵⁶

Although it noted that there might be acceptable alternatives,¹⁵⁷ the Court suggested the method for doing so that now is firmly entrenched as standard police procedure and fodder for police movies and television programs: Before beginning to question a suspect in custody, police have to warn the suspect that he has the right to remain silent, that any answers that he gives to questions can be used against him in court, that he has a right to be represented by counsel before and during questioning, and that an attorney will be appointed for him if he cannot afford one.¹⁵⁸ Police then have to obtain a waiver of those rights before questioning the suspect,¹⁵⁹

There is substantial debate about the legitimacy of the Court's use of prophylactic rules when interpreting the Constitution. Compare *Dickerson v. United States*, 530 U.S. 428, 457 (2000) (Scalia, J., dissenting) (describing judicial use of prophylactic rules as “a lawless practice”), and Grano, *Prophylactic Rules*, *supra* note 23, at 123-56 (contending that prophylactic rules are sometimes an illegitimate exercise of judicial authority), with Klein, *supra*, at 1031 (contending that judicial use of prophylactic rules is commonplace), and Strauss, *supra* note 23, at 190 (same).

154. See, e.g., Yale Kamisar, *Miranda: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1077 (1984) (reviewing LIVA BAKER, *MIRANDA: CRIMINAL LAW AND POLITICS* (1983) and describing *Miranda* as a “compromise” between the due process voluntariness test and the “extreme proposals” that would “kill” confessions”); Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 460-61 (“The *Miranda* decision, of course, was a compromise.”).

155. See, e.g., Ogletree, *supra* note 29, at 1830 (“[T]he *Miranda* rules do not go far enough . . . I would propose the adoption, either judicially or legislatively, of a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney.”); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 881 (1981) (book review) (contending that “[t]he Court could have done much better by insisting on the presence of an attorney during interrogation”).

156. See *United States v. Mandujano*, 425 U.S. 564, 579 (1976) (plurality opinion) (“The [*Miranda*] decision expressly rested on the privilege against compulsory self-incrimination; the prescribed warnings sought to negate the ‘compulsion’ thought to be inherent in police station interrogation.”); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“In order to combat these pressures [inherent in custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.”).

157. See *Miranda*, 384 U.S. at 467 (“Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket . . .”).

158. See *id.* at 467-73 (describing the necessary warnings).

159. See *id.* at 475-76 (describing the requirements for a valid waiver). In this respect, *Miranda* marked a departure from the general rule that a person who fails to assert the privilege when questioned loses the ability to claim later that the privilege requires suppression. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 429-30 (1984) (noting that the *Miranda* rules context is a “well-known exception to the general rule”).

and have to honor an invocation of either the right to silence or the right to counsel, whether such an invocation occurs before or during questioning.¹⁶⁰

Volumes have been written about the *Miranda* decision. But, for present purposes, one point stands out: None of the above-described steps requires or involves an interpretation of the Fifth Amendment privilege to ban government use of compulsion. The Court did not need to take that step in order to reach the result in *Miranda*.¹⁶¹ The *Miranda* Court's conclusions are consistent with the interpretation of the privilege in the immunity and penalty cases—as a rule that addresses only the admissibility of compelled statements. That outcome is not dependent on whether one takes a “strong” view of *Miranda*—that custodial police interrogation always is compelling—or a “weak” view—that the *Miranda* Court established only a prophylactic rule, one that presumes compulsion. The *Miranda* rules simply describe a Court-approved means of dispelling the compulsion inherent in some or all custodial interrogation. Although police compliance with those rules is vitally important to obtain a noncompelled and thus fully admissible statement, police disregard of them does not violate the Constitution.

It is true that some language in the *Miranda* opinion describes the new rules as if they are commands to police. According to the opinion, a person subject to custodial interrogation “must first be informed in clear and unequivocal terms that he has the right to remain silent”¹⁶² and “must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation”;¹⁶³ further, if the suspect asserts his right to silence or counsel, “interrogation must cease” and “police must respect his decision.”¹⁶⁴ Similarly, language in some of the Court's post-*Miranda* decisions describes features of the *Miranda* rules as if they were directives to police.¹⁶⁵ But the Court had made clear at the outset of the *Miranda* opinion that “we deal with the *admissibility* of statements obtained

160. *Miranda*, 384 U.S. at 473-74 (noting that the rule requires police to terminate questioning if “the individual indicates in any manner, at any time prior to or during questioning” that he wishes to remain silent or consult with counsel).

161. See *Cooper v. Dupnik*, 963 F.2d 1220, 1254 (9th Cir.) (en banc) (Brunetti, J., dissenting) (“The [*Miranda*] Court did not hold, nor did it need to hold, that the Fifth Amendment can be violated absent the use of an incriminating statement against a criminal defendant in court.”), *cert. denied*, 506 U.S. 953 (1992).

162. *Miranda*, 384 U.S. at 467-68.

163. *Id.* at 471.

164. *Id.* at 473-74.

165. See, e.g., *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam) (describing “[a]n officer’s obligation to administer *Miranda* warnings”); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (“[W]e now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present”); *Moran v. Burbine*, 475 U.S. 412, 420 (1986) (“*Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused.”); *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (“We . . . emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.”).

from an individual who is subjected to custodial police interrogation,"¹⁶⁶ a point that it reiterated after describing the warnings and waiver requirements,¹⁶⁷ and again in later cases.¹⁶⁸ Accordingly, one properly could read the above-quoted "commands" as preconditions for admissibility, as if each were prefaced with the words: "In order to obtain an admissible statement . . ." or "[i]n order to dispel the compulsion . . ." The conflicting language cuts in both directions,¹⁶⁹ and thus provides no real support for the view that *Miranda* transformed the privilege into a rule that imposes direct obligations on police.

In addition, for purposes of assessing police officers' present obligations to comply with the *Miranda* rules, the Court's current view has more import than what one can glean from conflicting passages in the *Miranda* opinion, which now is over thirty-five years old. Significantly, in *Dickerson v. United States*,¹⁷⁰ the Court's most recent pronouncement on *Miranda*, it wasted little time in describing *Miranda* as a rule of admissibility, making that point twice in the opening paragraph of the opinion.¹⁷¹ A number of scholars appear to agree that *Miranda* governs admissibility, not police conduct.¹⁷²

166. *Miranda*, 384 U.S. at 439 (emphasis added).

167. *Id.* at 476 ("The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.").

168. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (describing "the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment" (emphasis added)); *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) ("In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt."); *Michigan v. Mosley*, 423 U.S. 96, 99-100 (1975) (noting that in the event of failure by police to "give certain specified warnings" before custodial interrogation and to "follow certain specified procedures" during questioning, "any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial"); *Michigan v. Tucker*, 417 U.S. 433, 441 (1974) (describing *Miranda* as follows: "In more recent years this concern—that compelled disclosures might be used against a person at a later criminal trial—has been extended to cases involving police interrogation." (emphasis added)). At times, the Court has used "admissibility" and "command" language in the same opinion. See *Orozco v. Texas*, 394 U.S. 324, 326 (1969) (holding that "the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*," but also noting that the *Miranda* "opinion iterated and reiterated the absolute necessity for officers interrogating people 'in custody' to give the described warnings").

169. See, e.g., Loewy, *supra* note 25, at 916 ("Language in both *Miranda* and its progeny can be found to support either conclusion." (footnotes omitted)).

170. 530 U.S. 428 (2000).

171. Discussing the conflict between *Miranda* and a statute that Congress had enacted to overrule the decision, see discussion *supra* note 23, the *Dickerson* Court stated:

In *Miranda v. Arizona*, 384 U.S. 436 (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a

2. *The § 1983 Cases*

Federal appellate courts have opined that *Miranda* and the privilege are rules of admissibility only. These views have surfaced in cases involving claims for relief under 42 U.S.C. § 1983, which permits a person to bring a civil action in federal court if a state actor subjects her to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."¹⁷³ When a criminal defendant seeks suppression of his statement by alleging a *Miranda* violation, it does not matter whether *Miranda* governs police conduct or admissibility. If there is a violation, either understanding of *Miranda* requires suppression of the statement. Thus, courts deciding criminal cases need not address the distinction. In contrast, when a claimant seeks damages or injunctive relief under § 1983 based on allegations that the police failed to follow the *Miranda* rules, the difference is critical. In order to permit such a claim to proceed, a court must find that the claimant has alleged facts that establish a constitutional injury.¹⁷⁴ Thus, § 1983 cases

constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

530 U.S. at 431-32 (emphasis added).

172. See, e.g., Klein, *supra* note 4, at 480 (stating that "[e]ven if it is established that every unwarned statement is 'compelled,' such statements must still be introduced in 'criminal proceedings'" to violate *Miranda*); Loewy, *supra* note 25, at 917 (contending that despite ambiguity in the Court's language describing the rule, "the *Miranda* doctrine ought to focus on the impropriety of using rather than obtaining the evidence"); Steiker, *supra* note 3, at 2473 n.26 (describing *Miranda* as a "right[] not to have evidence admitted at trial, rather than [a] right[] to be free from any particular form of treatment," and asserting that "[p]resumably, police conduct in violation of [the *Miranda*] rules, without the admission at trial of the offending evidence, would not itself violate the Constitution"); Strauss, *supra* note 126, 959 n.8 ("It seems doubtful that questioning a suspect in custody without warnings would violate the Constitution if the statements were never used as evidence, unless the interrogation were in some other way abusive."). But see *infra* Section I.D (describing contrary viewpoints).

173. 42 U.S.C. § 1983 (1994). The full statute reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

174. See, e.g., *Weaver v. Brenner*, 40 F.3d 527, 532 (2d Cir. 1994) (recognizing that the issue "whether coercing an incriminating statement from a suspect during custodial interrogation by the police violates the suspect's Fifth and Fourteenth Amendment rights" is the same as the issue whether there is an actionable claim under § 1983).

involving allegations of *Miranda* violations offer valuable insight into judicial attitudes about the nature of *Miranda* and the privilege.

With the possible exception of the Ninth Circuit,¹⁷⁵ the federal courts of appeals have rejected § 1983 claims based on allegations that police have failed to give *Miranda* warnings or honor invocations of *Miranda* rights.¹⁷⁶ According to one scholar:

So adamant are the courts in denying § 1983 actions under *Miranda* that some maintain “no rational argument can be made in support of the notion that failure to give *Miranda* warnings subjects a police officer to liability under the Civil Rights Act.” Those claiming violations of *Miranda* rights by asserting their rights to silence or counsel fare no better when police deny their “right to cut off interrogation” and continue to interrogate.¹⁷⁷

Although some courts have denied litigants civil relief by relying on the rule granting “qualified immunity”¹⁷⁸ to state actors sued under § 1983,¹⁷⁹ and others have cited the prophylactic nature of the *Miranda* rules,¹⁸⁰ many instead have concluded that a violation of the *Miranda* requirements “does not standing alone give rise to a constitutional violation.”¹⁸¹ Rather, a “violation occurs only when self-incriminating statements are introduced at trial, thereby compelling the defendant to ‘become a witness against himself.’”¹⁸² Those decisions provide additional support for the view that *Miranda* imposes no obligation on police.

175. See *infra* Subsection I.D.1.

176. For more complete treatment of the lower court § 1983 decisions, including district court decisions, see Gardner, *supra* note 25, at 1294-310; and Klein, *supra* note 4, at 434-54.

177. Gardner, *supra* note 25, at 1296 (quoting *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976)).

178. The doctrine of qualified immunity exempts public officials from civil liability under § 1983 if their “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

179. See, e.g., *Giuffre v. Bissell*, 31 F.3d 1241, 1255-57 (3d Cir. 1994) (noting disagreement between the Ninth Circuit decision, which held that aggressive interrogation and disregard of requests for counsel can violate the privilege without use of the resulting statement in a criminal case, and the persuasive contrary position of dissenting judges in that case, along with consistent opinions from other courts of appeals, and concluding that civil defendants were entitled to qualified immunity in a § 1983 action because the law was not settled).

180. See, e.g., *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) (“[F]ailing to follow *Miranda* procedures triggers the prophylactic protection of the exclusion of evidence, but does not violate any substantive Fifth Amendment right such that a cause of action for money damages under § 1983 is created.”).

181. *Weaver v. Brenner*, 40 F.3d 527, 534 (2d Cir. 1994).

182. *Riley v. Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997) (en banc). For examples from a number of federal courts of appeals, see *Deshawn E. v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998) (“While a defendant has a constitutional right not to have a coerced statement used against him, a defendant does not have a constitutional right to receive *Miranda* warnings.”); *Mahan v. Plymouth County House of Corr.*, 64 F.3d 14, 17 (1st Cir. 1995) (stating that the detective’s failure to read *Miranda* warnings was not actionable when no statement resulted); *Mahoney v. Kesery*, 976 F.2d 1054, 1061-62 (7th Cir. 1992) (rejecting a claim of violation of the privilege

C. Summary

As the above two Sections demonstrate, the text of the Fifth Amendment privilege, the immunity doctrine, the penalty cases, and the Court's characterization of the privilege all establish that the privilege does not forbid government use of compulsion to obtain statements. Although the *Miranda* Court expanded the notion of "compulsion" to introduce the privilege into police interrogation rooms, it did not prohibit that compulsion. Rather, it simply incorporated the new understanding into the preexisting framework of the privilege, in which a violation occurs only when a compelled statement is used in a criminal case. The lower courts' rejection of § 1983 claims based on allegations of *Miranda* violations reflects their understanding that there is no constitutional obligation to comply with the *Miranda* rules. Thus, police can violate the *Miranda* rules, even deliberately, without violating the Constitution.¹⁸³ If police choose to question a suspect without first reading *Miranda* warnings and obtaining a valid waiver, they may have failed to dispel whatever compulsion was inherent in the custodial setting, thereby triggering an exclusionary sanction, but have not violated any constitutional command. Similarly, if police continue to ask questions after a suspect has invoked his right to silence or counsel, that interrogation tactic may constitute compulsion under the privilege, requiring suppression to prevent use "in any criminal case," but does not run afoul of the Constitution unless police tactics violate due process.

because "we have said that 'the Fifth Amendment does not forbid forcible extraction of information but only the use of information so extracted as evidence in a criminal case—otherwise, immunity statutes would be unconstitutional,'" but noting that the court was not deciding whether to adopt "a more capacious view" of privilege "designed to forbid not only the use of coerced confessions in criminal proceedings but also the use of torture or equivalent means of coercive interrogation, whatever use is made of their fruits, if there are any fruits" (quoting *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989)); *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987) (stating that failure to give *Miranda* warnings did not deprive the suspect "of her constitutional rights as no statements obtained [from her] were used against her during trial"); and *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976) (rejecting a civil rights claim predicated on a failure to give *Miranda* warnings, as *Miranda* "requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence").

183. Violation of the *Miranda* rules, either those requiring pre-interrogation warnings or termination of questioning upon a suspect's request to remain silent or consult counsel, may be a factor in a determination that a due process violation occurred, see *supra* note 127 and accompanying text, but will not, standing alone, establish a due process violation, see *supra* note 128 and accompanying text.

D. *Contrary Views: Does Either the Privilege or Miranda Prohibit Compulsion During Custodial Interrogation?*

In contrast to the authority described above, some jurists and scholars have concluded that either the privilege, *Miranda*, or both prohibit the government from using compulsion to elicit statements from criminal suspects. Their positions are described and assessed below.

1. *The Ninth Circuit Decisions: Extending the Privilege into the Police Station*

In three decisions, *Cooper v. Dupnik*,¹⁸⁴ *California Attorneys for Criminal Justice v. Butts*,¹⁸⁵ and *Martinez v. City of Oxnard*,¹⁸⁶ the Ninth Circuit concluded that, under some circumstances, police can violate the Fifth Amendment privilege by questioning a suspect, without regard to whether a resulting statement is used in a criminal prosecution. In *Cooper*, police who were investigating a series of rapes mistakenly focused on Cooper.¹⁸⁷ Following a predetermined plan, they ignored his repeated requests for counsel during custodial questioning and continued aggressive interrogation, hoping to elicit statements that, even though inadmissible in the prosecution's case-in-chief, they expected would be useful to impeach Cooper if he testified at trial or would keep him from testifying altogether.¹⁸⁸ After police realized that Cooper was not involved in the crimes, they focused their investigative efforts elsewhere. He sued under § 1983.¹⁸⁹

Cooper's claim that police had violated his Fifth Amendment rights reached an en banc panel of the Ninth Circuit.¹⁹⁰ Disagreeing with the three-judge panel that previously had decided the case,¹⁹¹ the full court determined that the police officers' deliberate plan to ignore Cooper's requests for counsel and their persistent and vigorous questioning violated the Fifth Amendment privilege even though no statement by Cooper had been used against him in any criminal case.¹⁹² The court hastened to add,

184. 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 953 (1992).

185. 195 F.3d 1039 (9th Cir. 1999), *cert. denied sub nom.* Butts v. McNally, 530 U.S. 1261 (2000).

186. 270 F.3d 852 (9th Cir. 2001), *cert. granted sub nom.* Chavez v. Martinez, 122 S. Ct. 2326 (2002).

187. 963 F.2d at 1228. Cooper became a suspect when an apparently unqualified police identification technician erroneously determined that fingerprints found at the scene of a rape matched Cooper's. *Id.*

188. *Id.* at 1223-32.

189. *Id.* at 1232-34.

190. *Id.* at 1234-35.

191. *Id.* at 1236 (describing the panel decision in *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991)).

192. *Id.* at 1238-44.

however, that a violation of the *Miranda* rules, standing alone, would not support a § 1983 claim, noting that it was “not establish[ing] a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak.”¹⁹³

Butts involved a § 1983 action arising from an “alleged policy, set forth in certain training programs and materials, . . . [that police would] continue to interrogate suspects ‘outside *Miranda*’ despite the suspects’ invocation of their right to remain silent and their requests for an attorney.”¹⁹⁴ The defendant police departments and officers conceded the existence of both the training materials and the policy of deliberately violating the *Miranda* rules.¹⁹⁵ The policy was designed to obtain statements that, although inadmissible in the prosecution’s case-in-chief, could be used to impeach suspects who chose to testify in their criminal cases.¹⁹⁶ At issue were interrogations of two suspects, McNally and Bey. After McNally had asserted his right to counsel, a police interrogator told him that “nothing that you say can be used against you in Court” and continued the questioning.¹⁹⁷ In McNally’s state criminal case, the court had suppressed the resulting statement in the prosecution’s case-in-chief and for impeachment,¹⁹⁸ but the prosecutor used it at sentencing.¹⁹⁹ Similarly, police questioned Bey despite his request for counsel.²⁰⁰ After the prosecution used the resulting statement to impeach Bey in his state criminal trial, a state appellate court determined that the trial court should not have permitted impeachment use because the statement had been

193. *Id.* at 1244; see also *Reser v. Las Vegas Metro. Police Dep’t*, 2000 WL 1585648, at *1 (9th Cir. Oct. 20, 2000) (citing *Cooper* for the proposition that “this court had stated in no uncertain terms that a technical *Miranda* violation would not support a cause of action under § 1983”); *Cooper*, 963 F.2d at 1252 (Wiggins, J., concurring) (emphasizing “that our decision in this case does not expand liability under 42 U.S.C. § 1983 to include ordinary *Miranda* rights advisement violations”). Nonetheless, one commentator has argued that *Cooper* can only be understood as having created a federal cause of action for *Miranda* violations. See Gardner, *supra* note 25, at 1302.

194. *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1041 (9th Cir. 1999), *cert. denied sub nom. Butts v. McNally*, 530 U.S. 1261 (2000).

195. *Id.* at 1049-50. The defendants “contend[ed] that their reliance on training and training materials entitle[d] them to qualified immunity.” *Id.* at 1049. For a discussion of the policy and training materials, see Weisselberg, *supra* note 4, at 133-37.

196. 195 F.3d at 1049-50.

197. *Id.* at 1042-44. Later, the questioner mentioned to McNally that “we’re promising you, it’s not gonna’ be used against you—in the case in chief—against you, okay?” *Id.* at 1044. For a discussion of the implications of a police officer’s communication of ambiguous or misleading legal advice to a suspect, see *infra* note 404 and accompanying text (suggesting that the prosecution can be bound to police representations of inadmissibility, with the defendant benefiting from any ambiguity).

198. 195 F.3d at 1044.

199. *Id.*

200. *Id.*

coerced.²⁰¹ Following *Cooper*, the Ninth Circuit determined that police conduct during the interrogation of both McNally and Bey could be found to have violated the privilege and was actionable.²⁰²

In *Martinez v. City of Oxnard*, the Ninth Circuit applied *Cooper* and *Butts* to hold that a police sergeant's persistent questioning of a badly injured suspect who was receiving emergency medical treatment for police-inflicted gunshot wounds violated the privilege even though the statements were never introduced in a criminal prosecution.²⁰³ (As discussed in Part III, the Supreme Court has granted review in *Martinez*, which now is entitled *Chavez v. Martinez*.)

The *Cooper* decision outlined the reasoning that the Ninth Circuit applied in all three cases. In order to find that the police use of compulsion alone could violate the privilege, and to respond to the *Cooper* dissenters who had argued that "it is the use of coerced statements that constitutes a Fifth Amendment violation,"²⁰⁴ the *Cooper* majority identified what it called "the first and fundamental aspect of *Miranda*":²⁰⁵ its extension of "the Fifth Amendment into police stations."²⁰⁶ The *Cooper* majority quoted liberally from the *Miranda* opinion, including a passage in which the Supreme Court had noted: "Today, then, there can be no doubt that the

201. *Id.* at 1045. Although statements taken in violation of the *Miranda* rules are admissible to impeach a defendant's contrary trial testimony, *see infra* Subsection II.A.2, impeachment use of statements deemed coerced under the due process voluntariness test is prohibited, *see infra* note 283. After finding that Bey's statement had been coerced and therefore was improperly used for impeachment, the state appellate court held that the error was harmless. *People v. Bey*, 27 Cal. Rptr. 2d 28, 30-31 (Ct. App. 1993).

202. 195 F.3d at 1045-47. The *Butts* court rejected the civil defendants' efforts to distinguish *Cooper* as involving "more intimidating and coercive" questioning, *id.* at 1046, as well as their reliance on *Cooper*'s disclaimer that it was not establishing a "cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a *benign way, without coercion or tactics that compel him to speak*," *id.* (quoting *Cooper v. Dupnik*, 963 F.2d 1220, 1244 (9th Cir.) (en banc) (emphasis added), *cert. denied*, 506 U.S. 953 (1992)). The court determined that whether there had been sufficient coercion was a question of fact to be decided at trial. *Id.* at 1046-47.

203. 270 F.3d 852, 854-57 (9th Cir. 2001), *cert. granted sub nom. Chavez v. Martinez*, 122 S. Ct. 2326 (2002). A police officer shot Martinez several times after he struggled with the officer's partner. *Id.* at 854. While medical personnel were treating the seriously injured Martinez in the emergency room, a police sergeant ignored repeated demands from hospital employees that he leave and instead conducted a tape-recorded interview of Martinez without *Miranda* warnings. The sergeant continued to question Martinez despite his requests to terminate the interview, his expressions of pain and fear of dying, his lapses into unconsciousness, and his failure to respond to questions. *Id.* at 854-55.

Martinez later sued under § 1983, claiming that the interrogation violated the privilege and due process. The district court rejected a claim of qualified immunity and granted summary judgment for Martinez on both the Fifth and Fourteenth Amendment claims. *Id.* at 855. On interlocutory appeal, the Ninth Circuit affirmed. Although the court acknowledged that "Martinez's statements were not used against him in a criminal proceeding," it relied on *Cooper* and *Butts* to conclude that the "coercive questioning violated Martinez's Fifth Amendment rights." *Id.* at 857.

204. *Cooper*, 963 F.2d at 1254 (Brunetti, J., dissenting).

205. *Id.* at 1239.

206. *Id.*

Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."²⁰⁷ Relying on that language, the *Cooper* court concluded that police who compelled a statement during interrogation violated the privilege.²⁰⁸ *Butts* and *Martinez* simply followed suit.²⁰⁹

Unfortunately, the Ninth Circuit confused the way in which the privilege functions and misread *Miranda*. It failed to distinguish between the two settings in which the privilege operates. As already explained, in the first setting a person can assert the privilege to refuse to answer questions,²¹⁰ or it can be self-executing, as in the *Miranda* context.²¹¹ The government can overcome the privilege in this setting by use of statutory or de facto immunity. In the second setting, the privilege forbids the introduction into evidence of a previously compelled statement.²¹² As also discussed above, the Court has interpreted the privilege generously in the former setting, by recognizing that the privilege either can be asserted or is self-executing in a broad range of situations.²¹³ In the passages that the *Cooper* court quoted, *Miranda* simply followed that pattern by recognizing that the privilege guarantees a right to refuse to provide answers that might be self-incriminating during custodial police interrogation.²¹⁴ But the *Cooper* court mistakenly interpreted *Miranda* to hold that the privilege can be violated during custodial interrogation. Indeed, *Cooper* articulated this

207. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (emphasis added)).

208. *Id.* at 1243-44; see also *Martinez*, 270 F.3d at 857 (contending that *Cooper* "echoed the Supreme Court's holding in *Miranda* that...[the] animating purpose [of *Miranda*] was adequately achieved only if the Fifth Amendment cast its protection against coerced self-incrimination not just over the courthouse, but also over the jailhouse, the police station, and other settings in which law enforcement authority was invoked to curtail a criminal suspect's freedom of action in any significant way"); Thomas S. Schrock et al., *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1, 21 (1978) (quoting the same language from *Miranda* as the *Cooper* court to reach the conclusion that "surely, if *Miranda* gives the fifth amendment force and effect in the police station then its meaning is that the fifth amendment can be violated in that place").

209. *Martinez*, 270 F.3d at 857; *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1046-47 (9th Cir. 1991), cert. denied sub nom. *Butts v. McNally*, 530 U.S. 1261 (2000); see also *People v. Peevy*, 953 P.2d 1212, 1224 (Cal. 1998) ("[T]he high court has imposed an affirmative duty upon interrogating officers to cease questioning once a suspect invokes the right to counsel....").

210. See *supra* notes 47-56 and accompanying text (discussing the operation of the privilege in the first setting).

211. The Court has made clear that the privilege is self-executing in the *Miranda* context without the need for an affirmative decision. See *supra* notes 62, 159.

212. See *supra* notes 57-62 and accompanying text (discussing the operation of the privilege in the second setting).

213. See *supra* notes 51-52 and accompanying text (discussing the fact that the Court has permitted the assertion of the privilege in civil, administrative, and criminal proceedings, whether formal or informal).

214. See *supra* notes 138-146 and accompanying text (describing *Miranda*'s extension of the privilege to permit its assertion by those subject to custodial interrogation).

error clearly, claiming that *Miranda* “had established the constitutional right not to be compelled to be a witness against oneself in police stations.”²¹⁵ The *Cooper* court thus read the words “in any criminal case”²¹⁶ in the privilege to encompass interrogation in police stations. This construction finds no support in the text of the privilege, *Miranda*, its progeny, or any Supreme Court Fifth Amendment decision. Those authorities do no more than establish that a suspect can *assert* the privilege (and that it is self-executing absent a waiver) in the police station. But, that alone is inadequate to establish use of a statement “in any criminal case,” which is necessary for there to be a *violation* of the privilege. Indeed, the Court has interpreted the largely synonymous “criminal prosecution” requirement of the Sixth Amendment right to counsel²¹⁷ to encompass only events occurring after the initiation of formal proceedings,²¹⁸ thus excluding pre-indictment custodial interrogation in police stations. Because the privilege cannot be violated absent use of a compelled statement “in any criminal case,” a requirement not satisfied by custodial questioning in a police station, the Ninth Circuit’s position is wrong.²¹⁹

215. *Cooper v. Dupnik*, 963 F.2d 1220, 1239 (9th Cir.) (en banc) (emphasis added), *cert. denied*, 506 U.S. 953 (1992).

216. U.S. CONST. amend. V.

217. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

218. See *supra* note 32 and accompanying text (describing the present interpretation of the Sixth Amendment right to counsel).

219. For other critical commentary on *Cooper v. Dupnik*, see, for example, Gardner, *supra* note 25, at 1310 (“Thus, under existing law, *Cooper* is improperly decided. No violation of either *Miranda* or the Fifth Amendment privilege occurred.”); and Klein, *supra* note 4, at 454 (“*Cooper II* is simply incorrect . . .”).

It bears mention that had *Cooper*, *Butts*, and *Martinez* interpreted the Fifth Amendment to foreclose civil relief based on claimed violations of the privilege absent use of compelled statements in a criminal case, this would not have left the plaintiffs without civil recourse. As noted above, courts have held that overly aggressive police interrogation can violate due process without regard to later use of any statements obtained, making such conduct actionable under § 1983. See *supra* note 124 and accompanying text. In both *Cooper* and *Butts*, there were judicial determinations that the police interrogation either could have or did violate due process. See *Cooper*, 963 F.2d at 1245 (finding that a civil rights plaintiff can establish a due process violation when “none of his statements ever were offered in evidence,” and permitting causes of action predicated on the due process theory to go forward); *People v. Bey*, 27 Cal. Rptr. 2d 28, 31 (Ct. App. 1993) (finding that the questioning of Bey, who later would be a plaintiff in *Butts*, was legally coerced). Similarly, the trial court in *Martinez* granted summary judgment for the plaintiff on a due process claim arising from the police interrogation. The Ninth Circuit affirmed that judgment. *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001), *cert. granted sub nom. Chavez v. Martinez*, 122 S. Ct. 2326 (2002). In addition, in *Butts*, the prosecution had used a compelled statement at sentencing, see *supra* note 199 and accompanying text, a stage that

2. *Professor Weisselberg and Visions of Miranda*

In two articles, Professor Charles Weisselberg has examined the police practices that the Ninth Circuit addressed in *Cooper* and *Butts*: deliberate violations of the *Miranda* rules,²²⁰ or, as some police officers describe it, taking statements “outside *Miranda*.”²²¹ Weisselberg correctly observes that the Supreme Court has given police officers incentives to engage in such conduct by creating significant limitations to the *Miranda* exclusionary rule.²²² Part II of this Article describes the Court’s decisions that created those incentives. Unfortunately, Weisselberg also concludes that this police conduct alone violates *Miranda*.²²³ He thus directs undeserved criticism at police for acting in accordance with those incentives.²²⁴

Professor Weisselberg posits two “visions” of *Miranda*: the “original vision”²²⁵—a constitutional rule governing “the conduct that ought to occur in the station house”²²⁶—and the “new vision”²²⁷—“a weak, non-constitutional rule of evidence.”²²⁸ He contends that the *Miranda* Court established the former, which he espouses as “a normative vision about the constitutional limits on a custodial interrogation.”²²⁹ He denigrates the latter, which he claims resulted “[p]rincipally” from the Court’s separation of “the warnings and waiver requirement from its constitutional underpinning, consequently diminishing respect for the values embodied in the Fifth Amendment.”²³⁰ Consistent with his understanding of these as the two available options for *Miranda*, Professor Weisselberg welcomes

satisfies the “in any criminal case” requirement of the privilege, see *supra* note 58 and accompanying text.

220. Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001); Weisselberg, *supra* note 4.

221. See Weisselberg, *supra* note 220, at 1122 (“During the last decade, the practice has become so pervasive in some jurisdictions that it has acquired its own moniker: questioning ‘outside *Miranda*.’” (citations omitted)); Weisselberg, *supra* note 4, at 133 (“Police officers commonly refer to this technique as questioning ‘outside *Miranda*.’”).

222. See Weisselberg, *supra* note 220, at 1121-22 (describing decisions in *Oregon v. Elstad*, 470 U.S. 298 (1985), *Oregon v. Hass*, 420 U.S. 714 (1975), *Michigan v. Tucker*, 417 U.S. 433 (1974), and *Harris v. New York*, 401 U.S. 222 (1971)); Weisselberg, *supra* note 4, at 126-29 (same).

223. See Weisselberg, *supra* note 4, at 180.

224. See *id.* at 132 (equating police officers who intentionally disregard *Miranda* rules because of incentives that Supreme Court decisions have created with Holmes’s “bad man of the law”).

225. *Id.* at 117-25 (describing the “[o]riginal [v]ision”).

226. *Id.* at 110.

227. *Id.* at 126-41 (describing the development and consequences of the “[n]ew [v]ision”).

228. *Id.* at 111; see also Weisselberg, *supra* note 220, at 1122 (“Proponents of this different view, which I have called the ‘new vision’ of *Miranda*, have claimed that *Miranda* sets forth a nonconstitutional rule of evidence that need only be followed when officers seek a statement to introduce in the prosecution’s case-in-chief at trial.” (citations omitted)).

229. Weisselberg, *supra* note 4, at 123.

230. *Id.* at 126.

Dickerson v. United States,²³¹ which made clear that *Miranda* has a constitutional basis.²³² Weisselberg believes that *Dickerson* demonstrates that “the Court [has] turned back [the] challenge [of the new vision] and placed *Miranda* on a more secure, constitutional footing.”²³³ He tentatively concludes that *Dickerson* may have an “impact . . . where *Miranda* was meant to matter most: the stationhouse,” by increasing police compliance with the *Miranda* rules.²³⁴

Professor Weisselberg’s criticism of police is unfounded and his expectations for *Dickerson* are misguided. Police who violate the *Miranda* rules commit no constitutional wrongdoing, a conclusion that *Dickerson* appears to support, not undermine. Professor Weisselberg’s first misstep is to conflate two issues that are distinct: the constitutional legitimacy of *Miranda*, which the *Dickerson* Court affirmed,²³⁵ and the nature of both the *Miranda* rules and the privilege from which they spring. One can agree with *Dickerson* “that *Miranda* is a constitutional decision”²³⁶—or even go further and subscribe to the view that *Miranda* operates with the full force of the privilege itself, and that any violation of the *Miranda* rules is a violation of the privilege—and still disagree with Weisselberg’s conclusion that police disregard of *Miranda* violates the privilege. As explained above, the privilege—the constitutional right itself—does not bar government use of compulsion.²³⁷ It prohibits only government use of compelled statements in criminal prosecutions.²³⁸ Even if *Miranda* goes every bit as far as the privilege, it can go no farther. Language in *Dickerson* characterizing *Miranda* as a rule that “govern[s] the admissibility of statements”²³⁹ both

231. 530 U.S. 428 (2000). In a letter to me, Professor Weisselberg noted that his “embrace of *Dickerson* is only lukewarm,” as he wishes that the Court had “deal[t] more directly with the impeachment and public safety exception cases.” Letter from Charles Weisselberg, Professor of Law and Director, Center for Clinical Education, University of California at Berkeley, to Steven Clymer 2 (Jan. 11, 2002) (on file with author).

232. See *supra* note 23 (describing the *Dickerson* opinion).

233. Weisselberg, *supra* note 220, at 1121.

234. *Id.*; see also *id.* at 1162 (concluding that “*Dickerson* . . . may enhance the ability of civil rights plaintiffs to deter deliberate violations of *Miranda*”). Weisselberg concedes that decisions like *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (holding that, under certain circumstances, a police officer’s failure to honor an invocation of the right to counsel may be actionable in a civil lawsuit under 42 U.S.C. § 1983), *cert. denied sub nom. Butts v. McNally*, 530 U.S. 1261 (2000), and *People v. Peevy*, 953 P.2d 1212, 1225 (Cal. 1998) (criticizing the practice of taking statements outside *Miranda*), may be “at least as significant as *Dickerson* in leading police agencies to instruct personnel to comply with *Miranda*.” Weisselberg, *supra* note 220, at 1162. In fact, as Weisselberg’s data show, *Butts*, which established the availability of civil lawsuits to address police disregard of *Miranda*, appears to have had a more significant role than *Dickerson* in changing police training practices. See *id.* at 1151 tbl.1.

235. See *supra* note 23.

236. *Dickerson*, 530 U.S. at 438.

237. See *supra* Section I.A.

238. See *supra* Section I.A.

239. *Dickerson*, 530 U.S. at 432; see also *supra* note 171 and accompanying text (describing and quoting the opening paragraph of the *Dickerson* opinion).

supports this view and undercuts Weisselberg's contention that *Miranda* is an anticomulsion rule. In other words, Weisselberg errs by neglecting to identify a third vision of *Miranda*—one that recognizes its constitutional status but acknowledges that it, like the privilege, is violated only by improper use of compelled statements in criminal cases.

As a result, Weisselberg's efforts to link *Miranda* closely to the privilege miss the point.²⁴⁰ The question is not whether *Miranda* is based on the privilege, but instead what the privilege prohibits. Here, Weisselberg fails to persuade. It is not until near the end of his first article, *Saving Miranda*, that he confronts the critical issue: "If police question a suspect in violation of *Miranda*, and under *Miranda*, there is a presumption of a Fifth Amendment violation, when does the violation occur?"²⁴¹ The most that Weisselberg can offer is an equivocal response: "Perhaps the best view is that the violation occurs at the station house, but continues or recurs at trial."²⁴²

Weisselberg offers four pieces of evidence in support of his claim that a violation occurs in the station house: (1) the penalty cases, which he claims "are impossible to square with the notion that Fifth Amendment violations occur only at trial";²⁴³ (2) "[t]he values that underlie the Fifth Amendment," which he maintains can be undermined "in the station house at the time that the questioning occurs";²⁴⁴ (3) language in *Edwards v. Arizona*,²⁴⁵ which describes a feature of the *Miranda* rules as a command to police;²⁴⁶ and (4) a conclusion that Weisselberg attributes to the Supreme Court—that deterrence "is a primary purpose of the *Miranda*/Fifth Amendment exclusionary rule"²⁴⁷—and one that he claims the Court made "[p]erhaps in recognition of the fact that a violation of the Fifth Amendment is complete

240. See Weisselberg, *supra* note 4, at 122-23.

241. *Id.* at 180.

242. *Id.*

243. *Id.*

244. *Id.*

245. 451 U.S. 477, 484-85 (1981).

246. Weisselberg, *supra* note 220, at 1125.

247. Weisselberg, *supra* note 4, at 180-81. Professor Weisselberg cites *Michigan v. Tucker*, 417 U.S. 433, 446-47 (1974), as the source of this conclusion. Weisselberg, *supra* note 4, at 181 n.365. He also cites *Oregon v. Hass*, 420 U.S. 714, 721 (1975), and *Harris v. New York*, 401 U.S. 222, 225 (1971). Weisselberg, *supra* note 4, at 181 n.365. Professor Weisselberg and I disagree whether *Tucker* can be read as stating that deterrence was a "primary purpose" of the exclusionary rule associated with the privilege or *Miranda*. As I read the case, the Court notes that deterrence is a "prime purpose" of the *Fourth Amendment* exclusionary rule. See *Tucker*, 417 U.S. at 446 (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). In the only passage in which it linked the deterrence rationale to the Fifth Amendment/*Miranda* exclusionary rule, the *Tucker* Court stated that "[i]n a proper case this rationale would seem applicable to the Fifth Amendment context as well." *Id.* at 447. Although the Court also discussed the deterrence rationale in *Hass*, 420 U.S. at 722-23, and *Harris*, 401 U.S. at 225, I do not think that these opinions support Weisselberg's "primary purpose" characterization either. Professor Weisselberg maintains that one can fairly read *Tucker* to support his position. See Letter from Charles Weisselberg to Steven Clymer, *supra* note 231.

at the time an unlawful interrogation occurs.”²⁴⁸ None of this evidence is persuasive.²⁴⁹

First, despite Weisselberg’s assertion to the contrary, and as already explained, the penalty cases not only can be squared with an understanding of the privilege as a rule of admissibility, but they also prove that such an understanding is correct.²⁵⁰ Those cases permit government use of explicit and powerful compulsion—threats of severe economic sanctions, including loss of one’s job, pension, and career—to obtain statements.²⁵¹ What they prohibit is both the later use of such statements in criminal prosecutions and government efforts to force waivers of the nonuse requirement.²⁵² It is Weisselberg’s view of the privilege that cannot be squared with the penalty cases.²⁵³

Second, Weisselberg’s reliance on the values supporting the privilege—which he describes to include “preserving autonomy, maintaining our adversarial system, curtailing inhumane treatment and police misconduct, avoiding false confessions, and complying with our sense of fair play”²⁵⁴—

248. Weisselberg, *supra* note 4, at 180.

249. Professor Weisselberg maintains that his articles offer more than these four pieces of evidence to support his view that *Miranda* is an anticomulsion rule. For example, he notes that a “main purpose of *Miranda*” was “to resolve the mess of *Escobedo* and avoid many claims of involuntariness” and that *Miranda* had the “desired effect of providing bright lines to avoid litigation over voluntariness.” See Letter from Charles Weisselberg to Steven Clymer, *supra* note 231. I agree with Professor Weisselberg’s understanding of the objectives of the *Miranda* Court but, as described in the text, conclude that the mechanism that the Court employed to achieve them, the Fifth Amendment privilege, is an exclusionary rule, not a rule governing police conduct.

250. See *supra* Subsection I.A.3 (describing the penalty cases).

251. See *supra* note 92 and accompanying text (describing the aspect of the penalty cases permitting the use of economic sanctions to compel statements).

252. See *supra* note 93 and accompanying text (describing aspects of the penalty cases barring use of compelled statements and forced waivers of the privilege). Weisselberg correctly notes that the claimants in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), *Lefkowitz v. Turley*, 414 U.S. 70 (1973), and *Gardner v. Broderick*, 392 U.S. 273 (1968), “faced no criminal charges and had no criminal trial.” Weisselberg, *supra* note 4, at 180 & n.363. But, it was the effort to force waivers of immunity and thus make the compelled statements available for use in possible future criminal prosecutions, not the compulsion to obtain the statements, that led the Court to determine that the states could not inflict the penalties in those cases.

253. Professor Schulhofer appears to take a position consistent with Weisselberg’s. See Schulhofer, *supra* note 134, at 947 (“A threat to discharge a public employee for a refusal to testify is impermissibly compelling per se.” (citing *Turley*, 414 U.S. 70)); *id.* (“The same principle applies to a threat to disqualify a contractor from doing business with public agencies because of his refusal to testify. . . . The disqualification threat, like the threat to discharge the public employee, is impermissibly compelling per se.”). If, by “impermissibly compelling per se,” Schulhofer means “unconstitutional,” his statements contradict the decisions that he cites, *Lefkowitz v. Cunningham* and *Lefkowitz v. Turley*, both of which make clear that such compulsion is permissible under the Fifth Amendment as long as the state does not insist on a waiver of immunity as well. See *supra* note 92 (quoting the *Cunningham* and *Turley* decisions).

254. Weisselberg, *supra* note 4, at 180 (paraphrasing, in his words, the purposes of the privilege) (citations omitted). As Weisselberg points out, *id.* at 140-41, the Court described the policies of the privilege in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). As explained above, see *supra* Subsection I.A.4, the *Murphy* Court’s explanations for the privilege are unpersuasive.

ignores the Supreme Court's repeated admonition that "the privilege has never been given the full scope which the values that it helps to protect suggest."²⁵⁵ Even were that not the case, Weisselberg offers no evidence that the privilege was designed to attack the danger of compelled self-incrimination by prohibiting compulsion instead of by outlawing only incrimination in a criminal case.

Third, Weisselberg's reference to language from *Edwards*—which states that "an accused who has 'expressed his desire to deal with the police only through counsel . . . is not subject to further interrogation by the authorities until counsel has been made available to him'"²⁵⁶—is unavailing. As noted above, one can find passages in both *Miranda* and its progeny that appear to command police compliance with the *Miranda* rules and conflicting passages that describe those rules in terms of their effect on admissibility.²⁵⁷ Only the latter passages cohere with the language of the privilege,²⁵⁸ immunity doctrine,²⁵⁹ the penalty cases,²⁶⁰ the Court's explicit descriptions of the privilege as a "trial right,"²⁶¹ the steps that the Court took to travel from the privilege to the *Miranda* rules,²⁶² and the lower courts' § 1983 decisions.²⁶³

Fourth, although Professor Weisselberg correctly identifies a conflict between the interpretation of *Miranda* presented here—as a rule of admissibility—and the Supreme Court's reliance on a deterrence rationale to limit the reach of the *Miranda* exclusionary rule,²⁶⁴ he makes too much of the point. Deterrence does presuppose a wrong to deter, which in this context indicates that failure to follow the *Miranda* rules is wrong. But,

255. *Schmerber v. California*, 384 U.S. 757, 762 (1966); see also *supra* notes 107-110 and accompanying text (describing the Court's and scholars' reluctance to rely on the broad language in *Murphy*).

256. Weisselberg, *supra* note 220, at 1125 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)). Professor Weisselberg maintains that there is similar language in other decisions, such as *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("The fundamental purpose of the Court's decision in *Miranda* was 'to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.'" (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)) (emphasis omitted)), that can be read to describe *Miranda* as a rule of conduct. See Letter from Charles Weisselberg to Steven Clymer, *supra* note 231.

257. See *supra* notes 162-169 and accompanying text.

258. See *supra* Subsection I.A.1.

259. See *supra* Subsection I.A.2.

260. See *supra* Subsection I.A.3.

261. See *Withrow v. Williams*, 507 U.S. 680, 691-92 (1993); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); see also *supra* Subsection I.A.5.

262. See *supra* Subsection I.B.1.

263. See *supra* Subsection I.B.2.

264. See *infra* notes 501-504 and accompanying text; see also Stone, *supra* note 23, at 140 n.217 (noting that "the Court's assumption in [*Baxter v. Palmigiano*, 425 U.S. 308 (1976),] that the act of obtaining a confession without *Miranda* warnings is not in itself unlawful seems inconsistent" with cases in which "the Justices proceeded on the assumption that the relevant issue was whether use of [a statement obtained in violation of the *Miranda* rules] would undercut the deterrent force of *Miranda*").

nothing in the opinions employing deterrence rationale suggests that the Court intended to interpret *Miranda* as a rule prohibiting compulsion. As discussed below, a more persuasive explanation is available, one proposed when the Court decided the cases that made mention of deterrence theory: The Court's reliance on deterrence was misplaced.²⁶⁵

3. *Professor Dripps and Ex Post Facto Suppression*

Professor Donald Dripps argues that "[q]uestioning the suspect in custody without a valid *Miranda* waiver violates the privilege even if the answers are never used in evidence."²⁶⁶ He offers the following to support this contention:

The police have no authority to grant immunity, and questioning cruel at the time cannot be made uncruel retroactively. As far back as *Marbury v. Madison*, the Supreme Court ruled that a witness who claims the privilege need not disclose incriminating facts subject to future suppression, but can, absent immunity, refuse to answer questions calling for incriminating answers The claim that actual use of compelled declarations against the declarant at a criminal trial is essential to any violation of the Fifth Amendment privilege runs counter to founding-era practice.

If use of the evidence against the witness at a criminal trial were necessary to show a constitutional violation, a suspect tortured into confessing would have no Fifth Amendment based civil remedy if the government chose not to use the fruits at trial. Yet the Fifth Amendment privilege was intended partly as an anti-torture provision

The best interpretation recognizes that coercive questioning with the object of ultimate incrimination violates the privilege, and

265. See Stone, *supra* note 23, at 111 (contending that because the privilege "by its own terms seems to dictate the exclusion of evidence obtained in violation of its commands" the Court's use of the deterrence rationale "was out of place in *Harris*"); see also *infra* notes 499-504 and accompanying text (criticizing use of the deterrence rationale). Not surprisingly, Professor Weisselberg candidly expresses some hesitancy about this aspect of his argument. See Weisselberg, *supra* note 4, at 180-81 ("Perhaps in recognition of the fact that a violation of the Fifth Amendment is complete at the time that an unlawful interrogation occurs, the Court in *Michigan v. Tucker* concluded that deterring future police misconduct is a primary purpose of the *Miranda*/Fifth Amendment exclusionary rule." (citation omitted, emphasis added)).

266. Donald Dripps, *Is the Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 30 (2000); see also Dripps, *supra* note 23, at 27 (contending that "the use in evidence seems to constitute a second violation of the Fifth Amendment, independent of the compulsion to speak in the first instance").

that use of the evidence constitutes a separate and distinct violation.²⁶⁷

These points do not withstand scrutiny. First, although it is true that police cannot grant formal immunity, they, like other government actors, can legally compel answers in some circumstances by making threats of economic sanctions.²⁶⁸ Second, while it may be impossible to undo cruelty, it is not readily obvious how that point supports Dripps's argument. The privilege does not outlaw cruelty, it prohibits compelled self-incrimination. If mention of cruelty is meant to refer to "the cruel trilemma of self-accusation, perjury or contempt" (the unenviable options facing a guilty suspect who must give sworn testimony about his misdeeds),²⁶⁹ the trilemma dissolves once there is assurance that self-accusing compelled testimony will not be used in a criminal prosecution of the declarant.

More generally, Dripps appears to assume that only a formal grant of immunity can resolve the trilemma and make it possible to compel statements constitutionally.²⁷⁰ But, the Court has made clear that the existence of an established suppression doctrine, like the *Garrity* rule, is sufficient to permit the government to compel answers without formal immunity.²⁷¹ Similarly, immunity grants do not explicitly guarantee witnesses that a different sovereign cannot make use of their testimony to prosecute them. Court-created doctrine provides that assurance, thus enabling one sovereign to compel testimony despite a threat of prosecution elsewhere, which, without such assurance, would support an assertion of the privilege.²⁷² Even if one accepts Dripps's view that *Marbury* sheds light on the meaning of the privilege, it simply reveals what the Court explained more recently in *Pillsbury Co. v. Conboy*²⁷³—that a court cannot use the

267. Dripps, *supra* note 266, at 31-32 (emphasis and footnotes omitted). Dripps concedes that Chief Justice Marshall's opinion in *Marbury* did not "invoke the Fifth Amendment," but contends that "at least to Joseph Story, the common-law and constitutional privileges were coextensive." *Id.* at 31.

268. Police internal affairs investigators routinely confer *Garrity* immunity by taking statements from police officers that are compelled by threats of job termination. See Clymer, *supra* note 84, at 1314-21.

269. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (listing avoidance of the "cruel trilemma" as one of the policies of the privilege).

270. Dripps states:

If the privilege is not violated until incriminating admissions are introduced into evidence against their declarant at a criminal trial, exclusion *ex post*, rather than immunity *ex ante*, would satisfy constitutional requirements. The government would not need to obtain a court order guaranteeing immunity before holding the witness who refuses to answer in contempt.

Dripps, *supra* note 266, at 30 n.44.

271. See *supra* notes 94-103 and accompanying text (describing the aspect of the penalty cases requiring assurance of future suppression to permit government compulsion).

272. See *Murphy*, 378 U.S. at 77-78 (holding that a state grant of immunity bars the federal government from making use or derivative use of immunized testimony to prosecute witnesses).

273. 459 U.S. 248 (1983).

contempt power to compel answers when there is only a mere "prediction" of future suppression.²⁷⁴ But the exclusionary rule for *Miranda* violations, which the Supreme Court has formulated in a number of decisions,²⁷⁵ offers more than a prediction of exclusion. It certainly is as well established as the *Garrity* suppression doctrine, which has been described in only a single Court decision and has an uncertain reach.²⁷⁶ The Court has deemed the suppression promised in *Garrity* to be sufficiently assured to permit government compulsion through economic sanctions without a formal immunity grant. *Dripps* does not explain why the more firmly entrenched *Miranda* exclusionary rule does not likewise permit official compulsion, so long as police do not violate due process.

Because *Dripps* does not elaborate, it is difficult to know what to make of his further reliance on "founding-era practice." It is not clear that one can draw meaningful lessons from practices in a period in which the privilege as we now know it did not exist.²⁷⁷ To the extent one can, it is difficult to derive support for the proposition that the police violate the Constitution by failing to comply with the *Miranda* rules. Both before and after the adoption of the privilege, justices of the peace routinely took unsworn statements from crime suspects without warning them of any "right to remain silent," and courts permitted introduction of the resulting statements in criminal trials.²⁷⁸ In addition, the practice of granting immunity was well

274. *United States v. Balsys*, 524 U.S. 666, 683 n.8 (1998) (citing *Pillsbury*, 459 U.S. at 261). In *Pillsbury*, the Court determined that "district courts are without power to compel a civil deponent to testify over a valid assertion of his Fifth Amendment right, absent a separate grant of immunity." 459 U.S. at 257 n.13. The district court's "predictive judgment" that any such testimony would be inadmissible in a later prosecution was not enough to overcome the privilege. *Id.* at 261.

275. See *infra* Subsections II.A.2-3.

276. Unlike the better-developed *Miranda* exclusionary rule, the Court has yet to determine whether the *Garrity* rule permits or prohibits impeachment with compelled statements or the use of evidence derived from such statements. See *supra* note 103 (commenting on the lack of Supreme Court authority defining the contours of *Garrity* protection).

277. See, e.g., John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994) (contending that the structure of criminal trials at the Founding era made it suicidal for criminal defendants, who were unrepresented, often facing capital punishment, and disqualified from testifying under oath at trial, to remain silent). See generally Stuntz, *supra* note 112, at 1231 n.7 (describing history as "a particularly poor guide when it comes to deciding the privilege's proper bounds"). *Dripps* himself has warned against undue reliance on original meaning in constitutional interpretation. See Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 602-06 (1990); cf. *Dripps*, *supra* note 266, at 26 (warning that whether custodial interrogation requires a special rule for waiver of the right to silence "is not a question to which we will find a specific answer in the intentions of the framers, for the modern police force did not exist until the middle portion of the nineteenth century").

278. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 334 (1999) (Scalia, J., dissenting) (noting that after "the principle of *nemo tenetur seipsum prodere* . . . was ratified as a fundamental right in the Fifth Amendment and its state-constitution analogues . . . [j]ustices of the peace continued pretrial questioning of suspects"); GRANO, *supra* note 134, at 129 (noting that at the time of the adoption of Fifth Amendment, there was no duty to advise suspects of a right to

established in the Founding era,²⁷⁹ making clear that, under appropriate circumstances, government actors could use compulsion to elicit testimony.

Finally, although the privilege may have been meant in part to outlaw torture, it does not necessarily follow that it did so by prohibiting compulsion directly. The underlying concern was not torture generally, but rather torture and other forms of compulsion employed to elicit statements that later could be used to incriminate.²⁸⁰ The privilege could address that concern by removing the incentive—the incriminatory value of the responses—through a prohibition on prosecutorial use of resulting statements. In any event, whatever the origins of and concerns that gave birth to the privilege, and the practices of the Founding-era generation, the present Court has made reasonably clear that the privilege now prohibits only the use of compelled statements.²⁸¹

II. IS IT ADVANTAGEOUS FOR POLICE TO VIOLATE THE *MIRANDA* RULES?

Even absent a constitutional obligation, police should comply with the *Miranda* rules if the costs of noncompliance outweigh the benefits. If the Court interpreted *Miranda* to require a robust exclusionary rule, similar to those that it applies to immunized testimony²⁸² and coerced confessions,²⁸³

remain silent at pretrial examination by justices of the peace); Alschuler, *supra* note 34, at 2638 (“The privilege in its inception was not intended to afford criminal defendants a right to refuse to respond to incriminating questions.”); *id.* at 2653 (“The [Founding-era] privilege did not prohibit the forceful incriminating interrogation of suspects by judges and magistrates so long as the suspects remained unsworn.”); Moglen, *supra* note 42, at 1094-104, 1123-29 (describing the Founding-era practice as devoid of privilege-based challenges to the well-established practice of justices of the peace taking unsworn statements from crime suspects for later admission at trial); Penney, *supra* note 29, at 318 (“Defendants were not informed that they could remain silent or that their statements might be used against them at trial.”).

279. See *supra* notes 64-65 and accompanying text (describing the historical roots of the practice of immunity).

280. See, e.g., *Feldman v. United States*, 322 U.S. 487, 500 (1944) (Black, J., dissenting) (“The real evil aimed at by the Fifth Amendment’s flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man’s compelled testimony to punish him.”).

281. See *supra* notes 115-119 and accompanying text.

282. The Court has interpreted the privilege to require suppression of both immunized testimony and any evidence derived therefrom in a prosecution of a previously immunized witness. See *supra* notes 70-74. It also has prohibited the use of immunized testimony to impeach the witness-turned-defendant. See *New Jersey v. Portash*, 440 U.S. 450, 459-60 (1979). The Court does permit the use of both truthful and allegedly false immunized testimony in a prosecution for committing perjury while giving immunized testimony. See *supra* note 70.

283. Coerced confessions are excluded from the prosecution’s case-in-chief and cannot be used for impeachment. See *Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978). Although the Court never has held that the fruits of a coerced confession, like those of a Fourth Amendment violation, are inadmissible as well, it likely would do so. See, e.g., Clymer, *supra* note 84, at 1355 n.201 (discussing the suppression of fruits of coerced confessions); Kamisar, *Miranda Fruits*, *supra* note 4, at 990-1005 (contending that the fruit of the poisonous tree doctrine applies to evidence derived from coerced confessions). *But see* Amar & Lettow, *supra* note 69, at 880-89 (contending that the

it would promote obedience to the *Miranda* requirements. But, the Court has done the opposite. In a series of decisions, some that determine the admissibility of a suspect's postarrest silence to impeach his trial testimony, and others that shape the *Miranda* exclusionary rule, the Court has created an incentive structure that encourages violations of the *Miranda* rules. This Part first describes those decisions and then explores the cost/benefit structure that they have established. It also explains that, although there is no evidence yet of widespread police disregard of *Miranda*, some police officers and departments have attempted to take advantage of these decisions.²⁸⁴

A. Incentives To Violate the *Miranda* Rules

1. Impeachment with Postarrest Silence

Dicta in *Miranda* addressed the consequences of a suspect's refusal to answer questions during custodial interrogation: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."²⁸⁵ Ten years later, *Doyle v. Ohio*²⁸⁶ offered the Court the opportunity to address more fully the situation that *Miranda* had described—the prosecution's use of a suspect's post-*Miranda* warnings silence to impeach his trial testimony.²⁸⁷

After arresting Doyle in connection with a marijuana transaction, police advised him of his *Miranda* rights.²⁸⁸ He remained silent.²⁸⁹ At trial, Doyle testified that he had been framed.²⁹⁰ The prosecutor cross-examined him about his failure to explain that to police after his arrest.²⁹¹ The Supreme

privilege should not be construed to exclude the fruits of coerced confessions). If it did, the Court likely would recognize exceptions to the rule requiring the suppression of fruits, as it does in the Fourth Amendment context. See Clymer, *supra* note 84, at 1357-59. For a description of the exceptions to the fruit of the poisonous tree doctrine, see *infra* note 465.

284. See *infra* notes 406-414 and accompanying text (describing the extent to which police officers and departments seek to gain evidentiary advantages by violating *Miranda* rules).

285. *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966).

286. 426 U.S. 610 (1976).

287. In 1975, a year before it decided *Doyle*, the Court exercised its supervisory power over federal courts to hold that a defendant's silence following *Miranda* warnings was insufficiently probative and too prejudicial to warrant its admission to impeach a defendant's trial testimony. See *United States v. Hale*, 422 U.S. 171, 180-81 (1975). *Hale* did not pass on the constitutionality of such use of silence. *Id.* at 173.

288. *Doyle*, 426 U.S. at 611-12.

289. *Id.* at 613-14.

290. *Id.* at 612-13.

291. *Id.* at 613-14.

Court reversed Doyle's conviction, "hold[ing] that the use for impeachment purposes of [Doyle's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."²⁹² Critical to the Court's decision was its view that "while . . . the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."²⁹³ Thus, the Court concluded that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."²⁹⁴

As Geoffrey Stone has pointed out, by relying on due process and the implicit assurance in the *Miranda* warnings, rather than on a broader theory,²⁹⁵ the *Doyle* Court left a number of questions unanswered.²⁹⁶ For present purposes, the key question after *Doyle* was whether either due process or the privilege prohibited prosecutorial use of silence to impeach when police had not given *Miranda* warnings.

The Court answered that question in two steps. First, in *Jenkins v. Anderson*,²⁹⁷ it held that the prosecution could use prearrest, prewarnings silence to impeach.²⁹⁸ More significantly, in a per curiam opinion in *Fletcher v. Weir*,²⁹⁹ the Court considered whether the prosecution could impeach a defendant's trial testimony with his postarrest silence when he

292. *Id.* at 619.

293. *Id.* at 618.

294. *Id.* The *Doyle* Court adopted the reasoning from Justice White's concurring opinion in *United States v. Hale*, 422 U.S. 171, 182-83 (1975) (White, J., concurring). For a discussion of *Hale*, see *supra* note 287. The Court since has determined that the prosecution cannot use a defendant's assertion of *Miranda* rights in its case-in-chief to disprove insanity, see *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986), and that when determining whether a *Doyle* violation merits habeas corpus relief, courts should employ a "less onerous" harmless error standard than the one that they typically use, see *Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993).

295. Stone proposed use of the "penalty" approach that the Court had employed in *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin*, the Court held that prosecutorial comment on a defendant's decision not to testify at trial was an impermissible penalty on the defendant's assertion of the privilege. *Id.* at 614 (condemning comment as "a penalty imposed by courts for exercising a constitutional privilege," and stating that comment "cuts down on the privilege by making its assertion costly"). According to Stone, the Court could have equated Doyle's silence with an assertion of the privilege, and determined that the prosecution's use of that silence to impeach was an unconstitutional penalty. See Stone, *supra* note 23, at 146-47 & n.241.

Although *Doyle* clearly rested on due process grounds, the Court recently described it as a *Miranda*-based decision. See *Dickerson v. United States*, 530 U.S. 428, 441 (2000) ("[W]e have also broadened the application of the *Miranda* doctrine in cases such as *Doyle*.").

296. See Stone, *supra* note 23, at 145-46.

297. 447 U.S. 231 (1980).

298. *Id.* at 238 ("[T]he Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."); *id.* at 240 ("[I]mpeachment by use of prearrest silence does not violate the Fourteenth Amendment.").

299. 455 U.S. 603 (1982) (per curiam). On *Fletcher*, see generally David E. Melson, Comment, *Fourteenth Amendment—Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings*, 73 J. CRIM. L. & CRIMINOLOGY 1572 (1982).

had not received *Miranda* warnings. The Court permitted such use of silence: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."³⁰⁰

Taken together, *Doyle* and *Fletcher* give police an incentive to violate the *Miranda* warnings requirements. If police believe that an arrested suspect will remain silent, disregard of *Miranda* will ensure that a prosecutor can use the silence to impeach at trial. Compliance with the *Miranda* warnings rules will foreclose use of that tactic.³⁰¹

2. *Impeachment with Statements Taken in Violation of the Miranda Rules*

In addition to holding that statements obtained in violation of the rules that it had announced would be inadmissible in the prosecution's case-in-chief, the *Miranda* Court suggested that such statements would be unavailable to a prosecutor attempting to impeach a testifying defendant.³⁰² But when the Court confronted a case raising the impeachment issue, it ruled otherwise. In *Harris v. New York*,³⁰³ a police officer violated the *Miranda* rules by giving a suspect incomplete warnings.³⁰⁴ Although recognizing that *Miranda* prohibited admission of the resulting statement to

300. *Fletcher*, 455 U.S. at 607. On the use of silence to impeach, see generally Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191 (1984); Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285 (1988); Maria Noelle Berger, Note, *Defining the Scope of the Privilege Against Self-Incrimination: Should Prearrest Silence Be Admissible as Substantive Evidence of Guilt?*, 1999 U. ILL. L. REV. 1015; Jane Elinor Notz, Comment, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV. 1009 (1997); and Stefanie Petrucci, Comment, *The Sound of Silence: The Constitutionality of the Prosecution's Use of Prearrest Silence in Its Case-in-Chief*, 33 U.C. DAVIS L. REV. 449 (2000).

301. See Stone, *supra* note 23, at 145-46 ("It seems anomalous to permit use of the defendant's silence to impeach when *Miranda* is violated, but not when it is obeyed. . . . [T]he very existence of this anomaly . . . provide[s] an incentive to the police to refuse to advise suspects of their rights . . .").

302. The suggestion came during the Court's explanation that all statements, whether "direct confessions," "statements which amount to 'admissions' of part or all of an offense," or "statements alleged to be merely 'exculpatory,'" were subject to exclusion if police violated the rules that it was announcing. *Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966). The Court described impeachment as one way in which the prosecution might make use of seemingly exculpatory statements and, in doing so, indicated that such use was impermissible:

In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

Id. at 477.

303. 401 U.S. 222 (1971).

304. *Id.* at 224. The officer did not advise the suspect of his right to counsel. *Id.*

prove guilt, the Court held that the prosecution's use of the statement to impeach the defendant's trial testimony was permissible.³⁰⁵ *Harris*, like the impeachment-with-silence cases, creates an incentive for police to question at least some suspects without advising them of their *Miranda* rights.³⁰⁶ If police believe that a suspect will invoke his rights if warned, it makes sense to refrain from giving the warnings. If the suspect remains silent, the prosecution will be free to impeach with silence.³⁰⁷ If, contrary to police expectations, the suspect gives a statement, it too will be available for impeachment if the defendant testifies. It also may serve to deter the defendant from either testifying, and thereby risking impeachment with the statement, or going to trial at all.

*Oregon v. Hass*³⁰⁸ presented the Court with a similar situation. There, a police officer gave proper *Miranda* warnings but continued interrogation after the suspect invoked his right to counsel.³⁰⁹ As in *Harris*, the Court held that a prosecutor could use the resulting statement to impeach contrary trial testimony.³¹⁰

Hass created a far more powerful incentive for police to disregard *Miranda* than *Harris*. When making the decision that *Harris* addressed—whether to give proper warnings at the outset—police have much to gain from compliance with *Miranda*, namely acquisition of a statement that is admissible to prove guilt in the prosecution's case-in-chief as well as to impeach. If police perceive that there is a chance of obtaining a statement after giving proper warnings, those benefits offset the contrary incentives

305. *Id.* at 225-26. The Court's opinion in *Harris* sparked blistering criticism. See, e.g., Dershowitz & Ely, *supra* note 120, at 1199 (contending that, aside from being wrong, the majority opinion "in crucial respects, flatly misstates both the record in the case before it and the state of the law at the time the decision was rendered" and that "each of the arguments set forth by the Court masks a total absence of analysis and provides no support for its result"); Stone, *supra* note 23, at 114 ("Whatever one's views of the result in *Harris*, the opinion from beginning to end, from the Court's treatment of the record, to its use of precedent, to its analysis of policy, lacks candor, meticulousness, and reasoned elaboration."). For an effort to explain the outcome in *Harris*, see Dripps, *supra* note 266, at 29-36 (attempting to reconcile *Harris* with other doctrine by use of waiver theory and "nontestimonial evidence theory").

306. See Stone, *supra* note 23, at 112 (describing the "substantial" incentive and noting that "it seems only reasonable to assume that [the] risk [of a suspect refusing to answer questions] would be reduced, and the likelihood of a confession increased, if the suspect is kept ignorant of his rights"). For a discussion of efforts to gather and analyze data to determine whether the *Miranda* rules do decrease the incidence of postarrest statements, see *infra* note 370 (describing efforts to determine the cost of the *Miranda* decision in terms of lost confessions and convictions).

307. See *supra* Subsection II.A.1.

308. 420 U.S. 714 (1975).

309. *Id.* at 715-16.

310. *Id.* at 722-24. The Court affirmed the vitality of *Hass* in *Michigan v. Harvey*, where it stated:

Hass was decided 15 years ago, and no new information [that the rule in *Hass* permitting impeachment with statements taken despite a *Miranda* invocation diminishes the deterrent effect gained by exclusion in the prosecution's case-in-chief] has come to our attention which should lead us to think otherwise now.

494 U.S. 344, 352 (1990).

that *Harris* created.³¹¹ In contrast, in the *Hass* situation, once a suspect has invoked his right to silence or counsel, there is only a slim chance of obtaining a statement that will be admissible in the prosecution's case-in-chief.³¹² Therefore, a police officer faced with a suspect's assertion of rights has little to lose, and possible impeachment evidence to gain, by continuing interrogation despite the *Miranda* rules.³¹³ The Court has not determined whether proof of a deliberate disregard of the *Miranda* rules in order to acquire impeachment evidence requires an exception to the *Harris/Hass* doctrine.³¹⁴ As explained below, there is a strong case that the Court should not recognize such an exception.³¹⁵

3. Admissibility of "Fruits" of Statements Taken in Violation of the *Miranda* Rules

In *Miranda*, the Court considered the admissibility of only the statements that police took without following the warnings and waiver requirements, not evidence derived from such statements.³¹⁶ The issue of the admissibility of derivative evidence, or "fruits," first came to the Court in 1971 in *Michigan v. Tucker*.³¹⁷ During a rape investigation conducted

311. Dripps states:

The police typically have hopes of obtaining an admissible confession by complying with *Miranda*, and they have little to gain by illegally questioning the suspect for the prize of keeping him off the stand at a future trial. There may be no future trial; most cases are either dismissed or end in guilty pleas. In any event excluding *Miranda*-tainted statements from the case-in-chief gives the police good reason to give the warnings and hope for the waiver that most suspects actually make in response.

Dripps, *supra* note 266, at 34.

312. For a discussion of the applicable rules, see *infra* notes 397-399 and accompanying text (describing the limited circumstances under which police may obtain a fully admissible statement after a suspect has invoked his rights).

313. See Dripps, *supra* note 266, at 36 ("In such a case, the police have nothing to lose by questioning illegally; the impeachment exception gives them a positive incentive to do so."); Stone, *supra* note 23, at 128 ("[T]he officer has virtually nothing to lose and everything to gain by ignoring the request for counsel . . .").

314. The two courts that have addressed the issue appear to have reached different conclusions. Compare *People v. Peevy*, 953 P.2d 1212, 1219 (Cal. 1998) (determining that impeachment use is permissible despite "a calculated and purposeful violation" of the *Miranda* rule requiring that police terminate questioning when the suspect invokes the right to counsel), with *Henry v. Kernan*, 197 F.3d 1021, 1028-29 (9th Cir. 1999) (suggesting that because "the officers set out deliberately to violate a suspect's *Miranda* rights," the resulting statement was not admissible to impeach as a prior inconsistent statement), *cert. denied*, 528 U.S. 1198 (2000). *Henry* may be limited to its unusual facts. See *infra* note 405 (explaining the role of the state evidentiary rule in the outcome of the case).

315. See *infra* notes 533-536 and accompanying text (explaining that focus on the officer's subjective motivation is misplaced, as there is no legal duty to comply with *Miranda* rules).

316. See *Michigan v. Tucker*, 417 U.S. 433, 445-46 (1974) (noting that there was no controlling precedent on whether courts should suppress the testimony of a witness discovered only because of a statement taken in violation of the *Miranda* rules).

317. 417 U.S. 433.

before the *Miranda* decision,³¹⁸ police arrested Tucker.³¹⁹ They warned him of the rights that the Court later would announce in *Miranda* except for the right to court-appointed counsel if he was indigent.³²⁰ He gave a self-exculpatory statement, but one that led police to a witness who gave information that incriminated Tucker.³²¹ The case against Tucker went to trial after the *Miranda* decision.³²² Relying on *Johnson v. New Jersey*,³²³ which held that *Miranda* applies to all later-tried cases,³²⁴ the trial court suppressed Tucker's statement.³²⁵ But, the court permitted the prosecution to elicit testimony from the witness whom police had discovered only because of the statement.³²⁶

When the Supreme Court addressed the defendant's challenge to use of this fruit of his statement, it did so in two parts. First, in a section of the opinion that triggered the debate about the legitimacy of the *Miranda* rules, a debate that recently culminated in the *Dickerson* decision,³²⁷ the Court considered "whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right."³²⁸ Second, the Court considered "whether the evidence derived from this interrogation must be excluded."³²⁹ After deciding that the police conduct had violated only the prophylactic *Miranda* rules, which it viewed as "not themselves rights protected by the Constitution,"³³⁰ the Court turned to the question of the admissibility of the fruits of such violations.

The Court held that the trial court had properly permitted introduction of the testimonial fruit of the statement that police had obtained in violation of the *Miranda* requirements.³³¹ But, it did so without embracing a suggestion from both the state of Michigan and the United States as amicus curiae that it "resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place."³³² Instead, in a narrowly

318. *Id.* at 435.

319. *Id.* at 436.

320. *Id.*

321. *Id.* at 436-37.

322. *Id.* at 435.

323. 384 U.S. 719 (1966).

324. *Id.* at 732.

325. *Tucker*, 417 U.S. at 437.

326. *Id.*

327. See *supra* note 23 and accompanying text (describing the legitimacy debate and culmination).

328. *Tucker*, 417 U.S. at 439.

329. *Id.*

330. *Id.* at 444.

331. *Id.* at 452.

332. *Id.* at 447 & n.21. Justice White appeared inclined to adopt a rule permitting the prosecution to introduce "the testimony of third persons . . . identified by means of admissions that are themselves inadmissible under *Miranda*." *Id.* at 461 (White, J., concurring).

drawn opinion, the Court suggested that the timing of the police conduct, which complied with the Court's then-existing interrogation doctrine, played a role in its decision.³³³ In addition, it distinguished situations in which there had been actual coercion.³³⁴ Ultimately, rather than establish a bright-line rule governing the admissibility of fruits of *Miranda* violations, the Court opted for a balancing approach, weighing what it considered the unpersuasive reasons for exclusion against the fact finder's need for evidence that was both relevant and no less reliable for having been discovered because of the violation of the *Miranda* requirements.³³⁵

The Court next addressed the derivative evidence issue in *Oregon v. Elstad*,³³⁶ a case involving a different type of evidentiary "fruit"—a criminal suspect's statement. Police arrested Elstad at his home in connection with a neighborhood burglary.³³⁷ While still there, and before advising Elstad of his *Miranda* rights, a police officer told him that the officer "felt [Elstad] was involved in" the burglary.³³⁸ Elstad responded: "Yes, I was there."³³⁹ Later, after being transported to the police station, and both receiving and waiving his *Miranda* rights, Elstad gave a written confession.³⁴⁰ Apparently having determined that the oral statement that preceded the warnings had occurred during custodial interrogation, the trial court ordered it suppressed,³⁴¹ but permitted the prosecution to introduce the written confession.³⁴²

At issue before the Supreme Court was the effect, if any, of the initial failure to give *Miranda* warnings on the admissibility of Elstad's postwarnings confession.³⁴³ There was authority that a coerced confession could taint a later, otherwise voluntary confession, requiring consideration of the time lapse between the confessions and whether there was a change in either the place of the confessions or the identity of the interrogators, to

333. *Id.* at 447-48.

334. *Id.* at 448-49.

335. *Id.* at 450-51. Noting that the *Tucker* opinion, which "emphasized the good faith of the police as a reason to admit the evidence," "nowhere suggests that any and all evidence derived from a *Miranda* violation is admissible," Professor Dripps contends that the decision can be read to shift to the defendant "the burden of proving that the government obtained the derivative evidence by exploiting the *Miranda* violation, and could not have discovered the evidence otherwise." Dripps, *supra* note 266, at 39-40. The *Tucker* Court's balancing approach lends some support to this interpretation. *See, e.g.*, 417 U.S. at 450 ("In summary, we do not think that any single reason supporting exclusion of this witness' testimony, or all of them together, are very persuasive.").

336. 470 U.S. 298 (1985).

337. *Id.* at 301.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 302.

342. *Id.*

343. *Id.* at 300 ("This case requires us to decide whether an initial failure of law enforcement officers to administer the [*Miranda*] warnings . . . without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights.").

determine whether the taint had been dissipated.³⁴⁴ In *Elstad*, the Court held that the taint inquiry was unnecessary when the first statement was the result of a failure to comply with the *Miranda* rules, not coercion. Rather, the Court held that “the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made”³⁴⁵ and whether there has been “a subsequent administration of *Miranda* warnings.”³⁴⁶

Although *Tucker* and *Elstad* both permitted the admission of evidence obtained following violations of the *Miranda* requirements, the decisions need not be read to establish a broad rule that the fruits of such violations always are admissible. A number of narrower interpretations are possible.³⁴⁷

For example, courts could permit use of the fruits of statements obtained without proper *Miranda* warnings, but not fruits acquired when police dishonor suspects’ assertions of their rights. The police officers in *Tucker* and *Elstad* committed the former transgression by giving either incomplete warnings (*Tucker*) or no warnings (*Elstad*). Alternatively, one could read the cases to permit the admission of derivative evidence involving volitional acts—such as a witness’s decision to provide useful information, as in *Tucker*, or a suspect’s decision to confess, as in *Elstad*—but not nontestimonial physical evidence.³⁴⁸ This approach would be consistent with Fourth Amendment doctrine, which treats volitional witness testimony as less susceptible than physical evidence to suppression as “fruit of the poisonous tree.”³⁴⁹ Although, for reasons stated below, resort to Fourth Amendment doctrine to determine the reach of the *Miranda* exclusionary rule is problematic,³⁵⁰ the *Elstad* Court relied on that authority.³⁵¹ Another possible limitation would permit the use of derivative

344. *Id.* at 310 (“When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.”).

345. *Id.* at 309.

346. *Id.* at 314.

347. See, e.g., Kamisar, *Foreword*, *supra* note 23, at 894 n.65 (suggesting limiting interpretations of *Elstad*); Kamisar, *Miranda Fruits*, *supra* note 4, at 972-73 n.199 (discussing narrow and broad readings of *Elstad*).

348. See Kamisar, *Miranda Fruits*, *supra* note 4, at 972 n.199 (suggesting that *Elstad* may not apply to “the admissibility of physical or nontestimonial evidence derived from a *Miranda* violation”). Justice O’Connor has concluded that courts should not suppress physical fruits of statements taken in violation of the *Miranda* rules. See *New York v. Quarles*, 467 U.S. 649, 665-72 (1984) (O’Connor, J., concurring in part and dissenting in part) (contending that a gun found as a result of an unwarned statement by an in-custody suspect should be admissible even if the statement is excluded).

349. See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978) (holding that witness testimony, which involves the exercise of free will, is more likely than physical evidence to be attenuated from an illegal search that leads police to the witness).

350. See *infra* notes 501-504 and accompanying text (contending that the deterrence rationale, which the Court uses to set the scope of the Fourth Amendment-based fruit of the poisonous tree doctrine, does not apply in the *Miranda* context).

351. See 470 U.S. at 308-09.

evidence only if police had obtained it without exploiting an earlier, “un-Mirandized” statement. The *Elstad* Court noted that “the officers [did not] exploit the unwarned admission to pressure respondent into waiving his right to remain silent.”³⁵² Finally, courts could permit use of fruits only if police had not deliberately violated the *Miranda* rules in hopes of gathering derivative evidence. The Court suggested that the failure to give *Miranda* warnings in *Elstad* was an error, likely based on the police officer’s reasonable belief that Elstad was not yet in custody when the officer’s comments elicited the incriminating oral response.³⁵³ Similarly, as described above, the police in *Tucker* complied in good faith with the then-existing rules regarding custodial interrogation.³⁵⁴

Despite these possible limitations, most lower federal and state courts have read the Supreme Court decisions broadly, to announce a general rule permitting the admission of all fruits of statements obtained in violation of the *Miranda* rules.³⁵⁵ This approach provides another reason for police officers to refrain from giving *Miranda* warnings to suspects who might invoke them if warned, and to disregard assertions of *Miranda* rights.³⁵⁶

In addition, *Elstad* reduces the cost of failing to give warnings in the first instance by enabling police officers to “cure” such violations. An officer who fears that an in-custody suspect will invoke his rights if warned at the outset of an interrogation can begin questioning without warnings. If

352. *Id.* at 316.

353. The Court suggested that the officer who obtained the statement may have been unsure whether the *Miranda* requirements applied to his conversation with Elstad. *Id.* at 315 (“This breach may have been the result of confusion as to whether the brief exchange qualified as ‘custodial interrogation’ . . .”). The Court also hinted that, had the issue been presented, it may have decided that Elstad was not in custody. *See id.* (“The State has conceded the issue of custody and thus we must assume that [the police officer] breached *Miranda* procedures in failing to administer *Miranda* warnings before initiating the discussion in the living room.”).

354. *See supra* text accompanying notes 317-320.

355. *See, e.g.,* United States v. DeSumma, 272 F.3d 176, 180-81 (3d Cir. 2001) (holding that the fruit of the poisonous tree doctrine is inapplicable when a defendant gives a voluntary statement without *Miranda* warnings, and citing consistent authority from other circuits); United States v. Orso, 266 F.3d 1030, 1034-35 n.3 (9th Cir. 2001) (en banc) (questioning, but ultimately accepting, that *Miranda* violations do not require suppression of derivative evidence, and that this rule continues “unabated” after *Dickerson*); United States v. Elie, 111 F.3d 1135, 1141-42 (4th Cir. 1997) (recognizing that fruits of violations of *Miranda* rules are admissible); Steiker, *supra* note 3, at 2524 (noting that lower courts have read *Elstad* “to mean that *Miranda* violations simply produce no suppressible ‘fruits’ at all”); Wollin, *supra* note 4, at 835-36 (“Following *Elstad*, federal and state courts have almost uniformly ruled that the prosecution can introduce nontestimonial fruits of a *Miranda* violation in a criminal trial.”). *But see* United States v. Byram, 145 F.3d 405, 409 (1st Cir. 1998) (recognizing that “[s]ome circuits have taken the view that *Elstad* is the end of any use of the fruits doctrine based on a *Miranda* violation,” but expressing the “highly tentative [view] . . . that *Elstad* does not wholly bar the door to excluding evidence derived from a *Miranda* violation”). There is reason to believe that the Court has adopted the view that the fruits doctrine does not apply to statements taken in violation of the *Miranda* rules. *See* Dickerson v. United States, 530 U.S. 428, 441 (2000) (describing *Elstad* as a decision “refusing to apply the traditional ‘fruits’ doctrine developed in Fourth Amendment cases”).

356. *See* Wollin, *supra* note 4, at 843-47 (discussing the incentives that a broad reading of *Elstad* creates).

the suspect makes a statement, the officer then can administer the warnings, reasonably confident that the suspect, who already has "let the cat out of the bag" and likely will not realize that his initial statement is inadmissible, will repeat the statement. As long as there is no compulsion, the initial failure-to-warn violation will not taint a postwarnings statement.³⁵⁷

B. The Costs and Benefits of Complying with and Violating the Miranda Rules

Consider the police officer or detective³⁵⁸ who, as explained in Part I, is unfettered by any constitutional obligation to follow *Miranda* and is motivated by the above-described incentives.³⁵⁹ What costs and benefits will play a role in her decision whether to comply with the rules regarding advice of rights and termination of interrogation upon assertion of those rights? Before addressing that question, it is helpful to lay bare some assumptions.

First, the discussion below assumes that the officer is aware, at least in a general sense, of both the *Miranda* rules and the above-described doctrines governing impeachment with postarrest silence, impeachment with statements taken in violation of the *Miranda* rules, and use of evidence derived from such statements. Although police officers may not read Supreme Court and lower court decisions, there is evidence that at least some law enforcement agencies offer training that keeps officers abreast of significant developments in *Miranda* doctrine.³⁶⁰

357. See Ogletree, *supra* note 29, at 1840 ("[T]he police are permitted to cure an inadmissible statement by giving the suspect *Miranda* warnings *after* the initial confession and then asking the suspect to repeat the incriminating statement."); Wollin, *supra* note 4, at 847 ("Whatever deterrent effect results from suppressing an unwarned confession is virtually eliminated when, under *Elstad*, the police can 'recover' the lost confession . . . by simply reading the suspect the *Miranda* warnings and continuing the interrogation.").

358. One study has shown that police detectives are more adept at securing waivers of *Miranda* rights than patrol officers. See Cassell & Hayman, *supra* note 2, at 901-02.

359. The following discussion assumes that the police officer works in a jurisdiction that (1) has determined that the failure to follow *Miranda*, without impermissible use of any resulting statements, is not a constitutional violation; (2) interprets *Elstad* and *Tucker* to hold that violations of the *Miranda* rules require suppression of only the resulting statements, not the fruits of those statements; and (3) considers police officers' motivations for violating *Miranda* rules irrelevant for purposes of applying the *Miranda* exclusionary rule. These assumptions often are valid. See *supra* notes 181-182 and accompanying text; *supra* note 314 and accompanying text; *supra* note 355 and accompanying text.

360. See Weisselberg, *supra* note 4, at 133-37 (describing the training materials distributed to police departments in California giving advice regarding use of statements taken in violation of the *Miranda* rules to impeach and discover physical evidence). Indeed, Professor Weisselberg has described how at least some departments tailor their training to applicable lower court decisions interpreting *Miranda*. See Weisselberg, *supra* note 220, at 1135-54 (describing the effect of state supreme court and federal court of appeals decisions on police training materials).

Second, it assumes that the officer is one who will tell the truth if called to testify about an interrogation at a suppression hearing.³⁶¹ The *Miranda* doctrine, and other constitutional rules, have little impact on police officers willing to lie about their conduct.³⁶²

Third, it assumes that the officer's decisions are driven by a desire to discover admissible evidence. As the Court has recognized, there are situations in which other objectives—locating a crime victim, finding a dangerous weapon, removing drugs or other contraband from circulation, identifying and locating accomplices or developing evidence against them,³⁶³ ensuring officer or public safety, or solving a crime in order to improve a detective's clearance rate—may drive police conduct.³⁶⁴ Nonetheless, because police also are interested in securing convictions, rules governing admissibility can play a significant role in shaping their conduct.

Although there undoubtedly are situations in which, and police officers for whom, one or more of these assumptions are invalid, our criminal justice system accepts them as generally accurate. Indeed, reliance on legal doctrine and exclusionary sanctions to regulate police behavior makes sense only if one accepts their validity.

361. There is no consensus about the frequency with which police commit perjury at suppression hearings. See Cassell & Hayman, *supra* note 2, at 899 ("Our data suggest, therefore, that police do not lie with any frequency about obtaining waivers or confessions, contrary to intimations to that effect advanced by some academics."). On police perjury, see generally Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive To Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (discussing police perjury in a variety of contexts); and Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037 (1996) (discussing police perjury during trial). Short of outright falsehoods, police may "minimize facts that would tend to support the suspect's claim of an invalid waiver." Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 432 (1999).

362. See, e.g., Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 693 (1996) ("The application of constitutional rules . . . depends entirely on how facts are found on motions to suppress or at trials of civil rights actions. Police perjury, if accepted, can defeat any constitutional rule.").

363. A defendant cannot challenge the admissibility of a co-conspirator's statement that police obtain in violation of the *Miranda* rules. See, e.g., *United States v. Escobar*, 50 F.3d 1414, 1422 (8th Cir. 1995) (holding that the defendant lacked standing to claim that the codefendant's statements should be suppressed under *Miranda*).

364. See *New York v. Quarles*, 467 U.S. 649, 655-58 (1984) (recognizing that the need for police to act in some circumstances to protect their safety and public safety may override considerations of admissibility of evidence); *Terry v. Ohio*, 392 U.S. 1, 12-14 (1968) (noting that although exclusion of evidence seized in violation of the Fourth Amendment in criminal trials is "a principal mode of discouraging lawless police conduct," suppression is not effective when "the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal").

1. *Warning the Suspect of His "Miranda Rights"*

a. *Complying with the Warnings Requirements:
Advantages and Disadvantages*

What advantages does a police officer derive from warning an in-custody suspect of his rights before beginning interrogation? First, and most obviously, if the suspect chooses to waive his *Miranda* rights and make a statement, a proper recitation of the warnings ensures that a court will admit the statement and any derivative evidence despite a *Miranda*-based motion to suppress.

Second, if a suspect makes an additional challenge to the admission of his statements to police on due process voluntariness grounds, there is little chance that a court will find a violation.³⁶⁵ As Professor Welsh White recently wrote after surveying reported state and federal decisions, "[W]hen the police have complied with *Miranda*, it is very difficult for a defendant to establish that a confession obtained after a *Miranda* waiver violated due process," in part because "some courts appear to equate a finding that a suspect's *Miranda* waiver was voluntary with a conclusion that her confession was also voluntary."³⁶⁶ Thus, adherence to *Miranda* all but guarantees admission of a suspect's statement.³⁶⁷

Third, perhaps counterintuitively, in some cases, an officer may advise a suspect of his rights in hopes of *increasing* her chances of obtaining a statement. Richard Leo has likened the process of police interrogation to a "confidence game," during which police use tactics that "con men" employ to take advantage of victims: "sizing up" or "qualifying" the suspect, then "cultivating" him through "strategies of manipulation and control," and then "conning" the suspect into confessing.³⁶⁸ Police may use the *Miranda* advisement as part of the cultivation process, to persuade suspects that they

365. See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984))).

366. Welsh S. White, *Miranda's Failure To Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219-20 (2001); see also Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1025 (2001) ("Virtually all observers seem to agree that *Miranda* has shifted the legal inquiry from whether the confession was voluntarily given to whether the *Miranda* rights were voluntarily waived.").

367. There may, however, be other constitutional grounds for suppression. See, e.g., *Brown v. Illinois*, 422 U.S. 590, 600-04 (1975) (holding that a statement taken in compliance with *Miranda* should have been suppressed because it was the fruit of an illegal arrest).

368. Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 266-82 (1996).

are acting in the suspects' interests, and thus gain their confidence, increasing the chances of obtaining statements.³⁶⁹

Despite a lack of consensus about the costs of *Miranda* invocations in terms of lost confessions and convictions,³⁷⁰ there is agreement that most

369. See Leo, *supra* note 366, at 1014 (noting that "several scholars have argued, somewhat counter-intuitively, that despite its enunciation of rights and cutoff rules, *Miranda* affirmatively encourages suspects to cooperate with their interrogators"). The *Miranda* Court recognized that a police interrogator's "concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator." *Miranda v. Arizona*, 384 U.S. 436, 453-54 (1966) (quoting FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 111 (1962)).

370. There is a large body of literature discussing *Miranda*'s effect on confession and crime-clearance rates. As Professor George Thomas was articulating the need for empirical assessments of the *Miranda* doctrine, see, e.g., George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996) (arguing that without better data, it is impossible to know whether *Miranda* reduces the rate of confessions), others, namely Paul G. Cassell, Bret S. Hayman, and Richard Leo, were publishing articles describing their empirical studies, see Cassell & Hayman, *supra* note 2, at 917-21 (describing a study of police efforts to interrogate suspects in cases presented to the Salt Lake City District Attorney's Office for prosecution, finding that "only 42.2% of the [Mirandized] suspects who were questioned gave incriminating statements" while 16.3% declined to waive *Miranda* rights, and tentatively concluding that "the benefits of *Miranda* seem slim while the costs seem substantial"); Leo, *supra* note 2, at 653, 677 (describing a study of interrogation practices of three police departments, finding that "78% of . . . [the] sample ultimately waived their *Miranda* rights, while 22% invoked one or more of their *Miranda* rights, thus indicating their refusal to cooperate with police questioning," and concluding that the study "does not support the assertion that *Miranda* has exercised an adverse effect on law enforcement"); see also Leo, *supra* note 3 (further describing the study); George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 935, 956 (1996) (reinterpreting data from the Cassell and Hayman study to show that "*Miranda* has had no effect on the overall confession rate, using 'confession' to include all incriminating statements" and suggesting that *Miranda* both increases the percentage of suspects who refuse to answer questions and those who make incriminating rather than exculpatory statements).

In addition, Professor Cassell scrutinized a number of *Miranda*-era efforts to quantify the effect that the decision had on confession rates. He interpreted those studies to estimate that *Miranda* led to a 16% decline in the confession rate. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Assessment*, 90 NW. U. L. REV. 387, 417 (1996). He then employed a similar approach to conclude that confessions are necessary for convictions in approximately 24% of criminal cases and tentatively opined that police compliance with *Miranda* resulted in lost cases against 3.8% of criminal suspects, which he characterized as a "heavy toll." See *id.* at 436-37, 499. The Cassell article sparked a debate with Professor Stephen Schulhofer, who questioned both Cassell's interpretation of the earlier studies and his conclusion that *Miranda* imposes an unjustifiable burden on law enforcement. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Costs*, 90 NW. U. L. REV. 500, 502 (1996) [hereinafter Schulhofer, *Miranda's Practical Effect*] (contending that the studies upon which Cassell relied show that "[f]or all practical purposes, *Miranda*'s empirically detectable harm to law enforcement shrinks to virtually zero"). Leo has been critical of the empirical studies upon which Cassell and Schulhofer rely:

My own view is that the outdated studies on which both Cassell and Schulhofer rely are so crudely designed, so ineptly executed, and so thoroughly riddled with the most elementary methodological defects that they do not permit anything but the most speculative guesses at *Miranda*'s quantitative impact on actual lost convictions, no matter how thoroughly or meticulously one canvasses the severely flawed and incomplete data they offer.

Leo, *supra* note 2, at 676 n.243.

The debate soon expanded to include interpretations of crime-clearance rates before and after *Miranda*. See Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996) [hereinafter Cassell, *All Benefits*] (replying to Schulhofer's

suspects do waive their rights and make statements, whether exculpatory or inculpatory, after receiving *Miranda* warnings.³⁷¹ Thus, at the outset, because of the above-described benefits, advising suspects of their rights appears to be a prudent course of action.

There are, however, costs to such compliance. First, in some cases, the warnings will prompt a suspect who otherwise would have given a statement instead to assert his right to silence or counsel and remain silent. Although police may be able to persuade a suspect to give a statement even after he invokes his rights,³⁷² an invocation likely will prevent police from obtaining a statement that will be admissible to prove guilt in the prosecution's case-in-chief.³⁷³

In addition, if an advisement of rights triggers a refusal to give a statement, *Doyle* forecloses prosecutorial use of the silence to impeach the suspect-turned-defendant if he testifies at trial.³⁷⁴ Because of these costs, if police believe that an advisement will cause a suspect to invoke his rights, they may be better served by initiating questioning without warnings.³⁷⁵

response and buttressing confession data with evidence showing the decline in crime-clearance rates at the time of the *Miranda* decision); Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327 (1997) (offering preliminary results of multiple regression analysis of crime-clearance rate data); Stephen J. Schulhofer, *Bashing Miranda Is Unjustified—and Harmful*, 20 HARV. J.L. & PUB. POL'Y 347 (1997) (contending that *Miranda* is a constitutional imperative that cannot be disregarded because of the social cost and rejecting Cassell's analysis of both confession and clearance rate data); Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996) (claiming that the decline in crime-clearance rates was due to the increase in the crime rate and the decrease in law enforcement resources, not the *Miranda* decision); see also Arenella, *supra* note 4, at 376 (criticizing both the Cassell and Schulhofer "narratives" about *Miranda* for exaggerating the costs and benefits of the rule).

Cassell and Richard Fowles later published an article with a completed multiple regression analysis of the crime-clearance rate data. See Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (contending that regression analysis isolates *Miranda* as a cause for the decline in the clearance rate); Donohue, *supra* note 4 (questioning the accuracy of the crime-clearance rate data upon which Cassell and Fowles relied and their contention that regression analysis demonstrates that *Miranda* caused a decline); Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) (responding to Donohue). For a summary of the Cassell/Schulhofer debate, see Leo, *supra* note 366, at 1006-09.

371. See, e.g., Cassell & Hayman, *supra* note 2, at 869 (reporting a study in Salt Lake City finding that 87.9% of suspects who were questioned waived rights and made a statement); Leo, *supra* note 2, at 652-54 (reporting a study finding that "78% of . . . [the] sample ultimately waived their *Miranda* rights"); Leo, *supra* note 366, at 1012 (noting that 78% to 96% of suspects waive rights). For a discussion of strategies that police use to persuade suspects to waive their rights both before and after invocations, see *infra* note 475.

372. See *infra* Subsection II.B.2 (describing police options when suspects invoke rights).

373. For a discussion of the applicable rules, see *infra* notes 397-399 and accompanying text (describing the limited circumstances under which police may obtain a fully admissible statement after a suspect has invoked his rights).

374. See *supra* notes 292-294 and accompanying text (describing the *Doyle* rule).

375. If the suspect makes a statement, police can give the warnings later and obtain another, fully admissible statement. See *supra* note 357 and accompanying text. Another strategy is to question the suspect before imposing restraints on the suspect's liberty. If the suspect is not in

b. *Violating the Warnings Requirements:
Advantages and Disadvantages*

The most obvious advantage to questioning a suspect without first giving warnings is that, for some suspects, it will reduce the likelihood of an assertion of either the right to silence or the right to counsel. In addition, if the unwarned suspect refuses to answer questions, his silence is available for use as impeachment evidence should he later testify.³⁷⁶

There are two principal costs of a decision to question without a *Miranda* advisement. First, if the suspect gives a statement, it will not be admissible in the prosecution's case-in-chief. This cost is partially tempered by the fact that the statement will be admissible to impeach and that evidence police derive from the statement will be admissible in the prosecution's case, for both impeachment and rebuttal.³⁷⁷

Second, a police officer who forgoes the *Miranda* advisement increases the risk that a court will determine that any resulting statement is subject to suppression, not only on *Miranda* grounds, but also under the due process voluntariness test as well.³⁷⁸ Such a ruling will preclude impeachment use and the admission of fruits of the statement.³⁷⁹

But, after *Elstad*, these costs are mostly offset by the ability to "cure" an earlier failure-to-warn violation. Having reaped the advantages of interrogation without *Miranda* warnings—an increased likelihood of eliciting a statement and preservation of the prosecutor's ability to use silence to impeach trial testimony—the police officer who obtains a statement then can give the warnings. If the suspect repeats his statement or otherwise continues to answer questions, as seems likely, the police officer gains the benefit of having given the warnings in the first instance—securing a statement that is admissible in the prosecution's case-in-chief.³⁸⁰

"custody," the *Miranda* requirements do not apply. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984) (holding that *Miranda* applies only when police conduct would cause a reasonable person to believe that he is subject to the level of constraint comparable to a formal arrest). There is evidence that some police officers employ this tactic to acquire statements without giving *Miranda* warnings. See Cassell & Hayman, *supra* note 2, at 881-84 (describing the shift to noncustodial suspect interviews); Leo, *supra* note 366, at 1017 (explaining how police use the tactic of "recast[ing] what would otherwise be a custodial interrogation as a non-custodial interview" to avoid *Miranda* rules by, for example, telling a suspect that he is not under arrest and free to leave).

376. See *supra* Subsection II.A.1 (describing the rule).

377. See *supra* Subsections II.A.2-3 (describing rules regarding admission of un-Mirandized statements to impeach and fruits of un-Mirandized statements).

378. Violations of the *Miranda* rules are a significant factor in determining whether there has been a due process violation. See *supra* note 127 and accompanying text.

379. See *supra* note 283 (describing rules that govern exclusion of coerced confessions).

380. See *supra* note 357 (describing the effect of eliciting a statement after warnings and waiver despite first having obtained an earlier statement without warnings). The police officers in *Withrow v. Williams* used this tactic. See 507 U.S. 680, 683-84 (1992) (describing the process by which officers first decided to question Williams without warnings, obtained a confession, then

There are two potential drawbacks to this approach: that, once warned, the suspect will not repeat the incriminating portions of a statement that he made before the warnings, and that a court will find that the first statement was involuntary, thus tainting the second statement.

In addition to the ability to "cure" *Miranda* violations, in certain circumstances, the so-called "public safety exception" to *Miranda* that the Court announced in *New York v. Quarles*³⁸¹ further minimizes the cost of neglecting to warn suspects of their rights. In that case, police responded to a victim's report that she had been raped by a man armed with a handgun and cornered the suspect, Quarles, in a market.³⁸² When they frisked Quarles, police discovered that he was wearing an empty shoulder holster.³⁸³ After arresting and handcuffing him, a police officer asked Quarles where the gun was without first advising him of his *Miranda* rights.³⁸⁴ Quarles nodded toward some empty cartons and stated, "[T]he gun is over there."³⁸⁵ Police recovered a loaded handgun from one of the cartons.³⁸⁶ The Supreme Court addressed the question of whether *Miranda* required suppression of the statement.³⁸⁷

Although it acknowledged that Quarles was subject to custodial interrogation,³⁸⁸ the Court determined that the statement was admissible despite the noncompliance with the *Miranda* requirements. The Court did so by announcing an exigency-based public safety exception to *Miranda*. It noted that the police reasonably could have asked Quarles about the gun both "to obtain evidence useful in convicting Quarles" and "to insure that further danger to the public did not result from the concealment of the gun

gave him the *Miranda* warnings, and obtained additional incriminating statements); see also *United States v. Orso*, 266 F.3d 1030, 1032, 1043 (9th Cir. 2001) (en banc) (describing police-initiated discussion about the crime with an arrested, handcuffed, and un-Mirandized suspect and police use of false assertions about incriminating evidence designed to establish a "beachhead," thereby increasing the possibility of a later, postwarnings confession).

381. 467 U.S. 649 (1984).

382. *Id.* at 651-52.

383. *Id.* at 652.

384. *Id.*

385. *Id.*

386. *Id.*

387. The Court also addressed the admissibility of the handgun. *Id.* at 659. It determined that the gun was admissible for the same reasons that Quarles's statement was admissible. *Id.* at 659-60. If the Court had suppressed the statement because of the officer's failure to give Quarles a *Miranda* advisement before asking about the weapon, the Court still could have permitted introduction of the gun. See *supra* Subsection II.A.3 (describing admissibility of fruits of statements taken in violation of the *Miranda* rules). Although the Court decided not to address that issue in *Quarles*, see 467 U.S. at 660 n.9, Justice O'Connor, who would have required exclusion of the statement, see *id.* at 660 (O'Connor, J., concurring in part and dissenting in part), contended that *Miranda* does not require suppression of physical fruits of unwarned statements, see *id.* at 665-74, a view that somewhat foreshadowed the majority opinion that she later wrote in *Oregon v. Elstad*, 470 U.S. 298 (1985) (holding that testimonial fruit of an unwarned statement is admissible).

388. 467 U.S. at 655.

in a public area.”³⁸⁹ The Court determined that police should be free to forgo warnings in such circumstances because otherwise, if warned, “suspects in *Quarles*’ position might well be deterred from responding.”³⁹⁰ In addition, the Court was unwilling

to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.³⁹¹

For present purposes, two aspects of *Quarles* bear mention. First, the Court rejected an approach that would have required an assessment of the subjective motivation of the officer who elicited the statement,³⁹² opting instead for an objective approach based on whether the questions were “reasonably prompted by a concern for the public safety.”³⁹³ Second, given the circumstances in *Quarles*, which made it questionable whether there was any real threat to the safety of the public or police,³⁹⁴ the Court’s determination that the public safety exception permitted admission of *Quarles*’s statement and the weapon presented the risk that the exception would swallow *Miranda* in cases involving a threat of undiscovered firearms and other threats to safety.³⁹⁵

389. *Id.* at 657.

390. *Id.*

391. *Id.* at 657-58. For a discussion of federal appellate courts’ treatment of *Quarles*, see Jim Weller, Comment, *The Legacy of Quarles: A Summary of the Public Safety Exception to Miranda in the Federal Courts*, 49 BAYLOR L. REV. 1107 (1997).

392. 467 U.S. at 655-56 (holding that “the availability of the exception does not depend upon the motivation of the individual officers involved”).

393. *Id.* at 656; see also Sidney M. McCrackin, Note, *New York v. Quarles: The Public Safety Exception to Miranda*, 59 TUL. L. REV. 1111, 1126 (1985) (“Officers are free to interrogate without issuing *Miranda* warnings even if their primary motivation is to obtain incriminating evidence, so long as a court can later find that the questions were appropriate to protect public safety.”). For an argument that *Quarles* nonetheless requires inquiry into an officer’s subjective motivation, see Marc Schuyler Reiner, Note, *The Public Safety Exception to Miranda: Analyzing Subjective Motivation*, 93 MICH. L. REV. 2377 (1995). Reiner does acknowledge that “[m]any [courts] have interpreted *Quarles* as prohibiting any inquiry into an interrogating officer’s subjective beliefs and motivations.” *Id.* at 2378.

394. Police had surrounded and handcuffed *Quarles*, and then holstered their service revolvers. The arrest took place at night when the market where the police found *Quarles* was empty except for clerks. The police correctly believed that *Quarles* did not have an accomplice who could have located or used the gun. See 467 U.S. at 675 (Marshall, J., dissenting) (contending that the Court’s assumption that there was a threat to public safety “is completely in conflict with the facts as found by New York’s highest court”).

395. Lower courts have understood *Quarles* to apply when police ask suspects whether they are armed and whether they possess needles or are drug users. See, e.g., Alan Raphael, *The Current Scope of the Public Safety Exception to Miranda Under New York v. Quarles*, 2 N.Y.

Coupled, these features of *Quarles* tempt police officers to forgo *Miranda* warnings in *Quarles*-like situations involving an arguable threat to officer or public safety. Even if the officer does so in order to secure an incriminating statement helpful for prosecution, not to safeguard himself, his colleagues, or the public, his subjective motivation will not prevent admission of the statement if a court later determines that the exception applies.

2. *Honoring Invocations of "Miranda Rights"*

a. *Honoring Requests To Terminate Questioning: Advantages and Disadvantages*

If the suspect tells a police officer who is questioning him that he wants to remain silent or consult counsel, should she terminate questioning? Because the chance of thereafter obtaining a fully admissible statement is remote and unforeseeable, there is very little to be gained by doing so. Police can obtain a fully admissible statement after an invocation in three circumstances.³⁹⁶

First, if the suspect initiates postinvocation conversation with police about the incident under investigation, and then waives his *Miranda* rights and makes a statement, the statement and its fruits are admissible both to prove guilt and to impeach.³⁹⁷

Second, if the suspect has asserted his right to *silence*, a statement resulting from further police-initiated contact is fully admissible only in the unlikely event that whatever postinvocation changes in circumstances have prompted that contact sufficiently alter the suspect's situation to cause a court to determine later that police have "scrupulously honored" the invocation despite the resumption of questioning. In order to meet that standard, the changes in circumstances may have to involve immediate termination of questioning upon invocation, a significant time lapse, a fresh set of *Miranda* warnings, a valid waiver, and questioning by a different police officer about a different crime.³⁹⁸

CITY L. REV. 63, 68-72 (1998) (surveying the cases). Courts have also applied *Quarles* to postinvocation interrogation related to safety concerns. *Id.* at 74-75.

396. For a discussion of the applicable doctrine, see, for example, *Leo & White*, *supra* note 361, at 424-31.

397. See *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-47 (1983) (finding a postinvocation statement admissible after the suspect reinitiated conversation by asking the officer, "Well, what is going to happen to me now?" and then waived his rights).

398. See *Michigan v. Mosely*, 423 U.S. 96, 97-107 (1975) (holding that when police immediately terminated the interview upon the suspect's assertion of the right to silence and returned him to the jail cell, and a different officer who wanted to question the suspect about a different crime arrived two hours later, reread *Miranda* warnings, and secured a waiver while the suspect was in a location different than that where the initial interrogation had occurred, police

Third, if the suspect has asserted his right to *counsel*, a statement resulting from further police-initiated contact is admissible in the even rarer event that, with the advice of and in the presence of his attorney, the suspect waives his *Miranda* rights and makes a statement.³⁹⁹

In contrast, the cost of honoring an assertion of rights is both significant and immediate. Absent a suspect's decision to initiate further conversation, a police officer's decision to terminate interrogation upon a suspect's request forecloses the chance of obtaining a statement.

b. *Ignoring Requests To Terminate Questioning:
Advantages and Disadvantages*

Because it is unlikely that police will be able to obtain a fully admissible postinvocation statement once a suspect invokes his rights, it makes good sense to ignore the invocation and continue to question the suspect. By doing so, police may persuade the suspect to make a statement. If so, the statement is admissible to impeach, and fruits of the statement are admissible.⁴⁰⁰ Such a statement also may prompt a guilty plea, obviating the need for a suppression hearing or a trial.

If, in their efforts to obtain a statement in this situation, police use too much pressure, they run the risk that a court will determine that their conduct violated due process, requiring suppression of any resulting

had "scrupulously honored" the suspect's right to cut off questioning and the resulting statement was admissible). The *Mosely* "scrupulously honored" standard has been rightly criticized as "devoid of any clear substantive content," Stone, *supra* note 23, at 134, and as offering "virtually no guidance to the police or the courts who must live with the rule," *id.* at 137. For a discussion of *Mosely*, see Paul Marcus, *A Return to the "Bright Line Rule" of Miranda*, 35 WM. & MARY L. REV. 93, 129-35 (1993).

399. See *Minnick v. Mississippi*, 498 U.S. 146, 153-56 (1990) (holding that the suspect who has asserted the right to counsel and has not reinitiated conversations with police must have counsel present in order to waive his rights); *Edwards v. Arizona*, 451 U.S. 477, 487 (1981) (holding that absent postinvocation suspect-initiated conversation, an assertion of the right to counsel renders any subsequent waiver of *Miranda* rights invalid until the suspect has first had access to counsel).

400. See *supra* Subsections II.A.2-3 (describing the admissibility of statements to impeach and fruits of statements despite violations of *Miranda* rules). In addition, if a court later determines that an alleged invocation was ambiguous, it may deny it legal effect. Thus, if the defendant has waived his rights and started to answer questions before making an ambiguous statement that may be an invocation, any subsequent answers are admissible. See, e.g., *Davis v. United States*, 512 U.S. 452, 458-59 (1994) (holding that law enforcement agents did not violate *Miranda* rules by continuing to question a suspect who made equivocal reference to an attorney while answering questions). If the alleged invocation precedes a waiver, police still have to secure a valid waiver in order to obtain a fully admissible statement.

Another approach, available in situations in which police are willing to release a suspect who has invoked his rights, is to do so and later request the suspect without taking him into custody. See, e.g., *People v. Storm*, 52 P.3d 52, 61-62 (Cal. 2002) (holding that a break in custody relieves police from honoring an assertion of the right to counsel); see also Maura Dolan, *Miranda Ruling Backs Police*, L.A. TIMES, Aug. 16, 2002, at B1 (describing the tactic of releasing suspects who invoke their rights to enable police to question later).

statement and its fruits.⁴⁰¹ Police must be particularly sensitive to that concern when conducting postinvocation questioning, because, although not dispositive, the refusal to permit the suspect to terminate questioning is one factor that courts consider when determining whether there has been a due process violation.⁴⁰²

C. Conclusion

A police officer's decision whether to give a suspect *Miranda* warnings at the outset of interrogation, rather than wait until she determines whether the suspect is willing to make a statement, and only then give the warnings, is a difficult one. On one hand, the warnings often do not trigger invocations, suggesting that the better practice is to warn suspects before questioning. On the other hand, there are some benefits—a reduced risk of an invocation and preservation of the ability to impeach with silence—and few costs to initiating questioning without warnings and then giving the warnings only when it is clear that the suspect will make a statement. It may make sense for police to evaluate suspects and give warnings at the outset of the interrogation only when they are confident that the advisement will not deter the suspect from making a statement.

The decision whether to honor invocations is more straightforward. The benefits of honoring an invocation are speculative and remote. In contrast, the significant advantages of dishonoring an assertion—possible acquisition of impeachment and derivative evidence—are much more tangible.⁴⁰³ Thus, although police should avoid due process violations,⁴⁰⁴ existing doctrine

401. See *supra* note 283 (describing the exclusionary rule for coerced confessions).

402. See *supra* note 127 and accompanying text (describing the effect of a *Miranda* violation on the inquiry as to whether police interrogation violated due process).

403. See David Cole, *Empty Warning*, LEGAL TIMES, Mar. 20, 2000, at 60 (noting that “the police have little to lose and much to gain by deliberately violating *Miranda*”).

404. Police interrogators' use of false, misleading, or ambiguous representations about the legal consequences of a postinvocation statement—for example, telling suspects that such statements are “off the record,” “can't be used in a criminal case,” or are “inadmissible”—is troubling. Courts properly could bind the prosecution to such promises, *cf.* *Santobello v. New York*, 404 U.S. 257, 262-63 (1971) (granting the defendant relief when the prosecution failed to fulfill promises in a plea agreement), and could interpret any ambiguities in the officers' claims in the defendants' favor, *cf.* *United States v. Plummer*, 941 F.2d 799, 805 (9th Cir. 1991) (finding that an ambiguous agreement between the government and a grand jury witness conferring use immunity should be construed to confer derivative use immunity as well). Alternatively, courts could consider such misrepresentations when deciding whether the police conduct violated due process. See *Linares v. State*, 471 S.E.2d 208, 211-12 (Ga. 1996) (finding a statement involuntary when “the agent promised Linares that nothing he said would be used against him”). Leo and White report that such tactics “have not been consistently dealt with by lower courts.” Leo & White, *supra* note 361, at 459.

counsels them to continue questioning despite a suspect's request to remain silent or consult with counsel.⁴⁰⁵

Are police departments taking advantage of these opportunities? Apparently some are.⁴⁰⁶ Before the Ninth Circuit's decision in *Butts*, Professor Weisselberg reported that California police departments used training materials advising officers to question suspects "outside *Miranda*" by continuing interrogation despite requests to remain silent or speak to counsel.⁴⁰⁷ Weisselberg also described evidence that "officers in California [had] followed this training."⁴⁰⁸ Although, as Weisselberg recently found, decisions from both the Ninth Circuit and the California Supreme Court critical of the practice apparently have altered some departments' training,⁴⁰⁹ "[w]hether the practice of questioning 'outside *Miranda*' will actually cease in California remains to be seen."⁴¹⁰

No similar judicial deterrent exists in the jurisdictions where courts have made clear that police officers do not commit a constitutional violation by disregarding the *Miranda* rules.⁴¹¹ Thus, Weisselberg's additional conclusion that "[t]he practice of questioning 'outside *Miranda*' may pervade other states as well"⁴¹² seems unsurprising. Despite that, in studies conducted by Paul Cassell and by Bret Hayman and Richard Leo, most, but not all, police officers followed the *Miranda* rules.⁴¹³ In an article

405. Indeed, even in the Ninth Circuit, which has been a vocal judicial critic of deliberate violations of the *Miranda* rules, it is unlikely that intentional disregard of those rules alone, without some associated police misconduct, will prevent either use of fruits of violations or impeachment with resulting statements. See *supra* note 193 and accompanying text (noting that the Ninth Circuit has refused to find that violation of *Miranda* rules alone is a constitutional violation). Although the Ninth Circuit granted habeas corpus relief in a case in which a California trial court admitted a statement obtained as a result of a deliberate violation of the *Miranda* rules to impeach as a prior inconsistent statement, the decision rested at least in part on a California evidentiary rule that permitted such statements to be used substantively as well as for impeachment. See *Henry v. Kernan*, 197 F.3d 1021, 1029 (9th Cir. 1999).

406. See Cole, *supra* note 403 (noting that "*Dickerson* may not be the real story," but instead, "[t]he real story . . . is that *Miranda* has already been overruled, in practice if not in theory, by police departments across the country").

407. See Weisselberg, *supra* note 4, at 133-36 (describing training materials that included passages informing officers that such statements could be used for impeachment and to discover physical evidence); see also Weisselberg, *supra* note 220, at 1123-25 (describing the training materials).

408. See Weisselberg, *supra* note 4, at 136-37 (describing appellate decisions reporting the practice, admissions that the City of Los Angeles made during civil rights litigation, and paperwork from Los Angeles Police Department interrogations).

409. See Weisselberg, *supra* note 220, at 1135-54.

410. *Id.* at 1162.

411. See *supra* notes 181-182 and accompanying text.

412. Weisselberg, *supra* note 4, at 137-38 & n.152 (describing court decisions from thirty-eight states other than California involving interrogation despite assertion of *Miranda* rights).

413. See Cassell & Hayman, *supra* note 2, at 861 ("[I]n none of our cases did the police continue questioning a suspect after an invocation of *Miranda* rights."); *id.* at 888-89 (stating that "[t]he qualitative impression of the researchers was that police almost always followed the *Miranda* requirements" and that they found "only one clear case of clear noncompliance" in

published in 1999, Leo and Welsh White describe questioning “outside *Miranda*” as “a relatively new interrogation strategy, which appears to be employed only in discrete situations.”⁴¹⁴

Although some scholars have criticized police who deliberately take statements “outside *Miranda*,”⁴¹⁵ Part I demonstrates that those officers commit no wrongdoing. One properly may question the Supreme Court and lower court decisions that created the above-described incentive structure, a topic that Part III addresses, but attacks on police who take advantage of the resulting costs and benefits are misguided. That is not to say that police *should* violate the *Miranda* rules whenever current doctrine tempts them with possible evidentiary advantages. Several factors may counsel restraint. First, there is no guarantee that courts, even those that deny § 1983 relief based on claims of *Miranda* rules violations, will reach the conclusions expressed in this Article. If faced with a deliberate violation of the *Miranda* rules in order to gain an evidentiary advantage, a court might prohibit impeachment use of any resulting statement or bar admission of the fruits of any such statement.⁴¹⁶ Second, even if appellate courts were to conclude that police commit no wrongdoing by disregarding *Miranda*, trial judges troubled by deliberate disregard may be more inclined to find due process violations.⁴¹⁷ Third, public relations concerns may cause police departments or individual officers to refrain from ignoring the *Miranda* guidelines that

which an inexperienced officer neglected to give *Miranda* warnings); Leo, *supra* note 2, at 653-54 (finding that in seven cases out of thirty-eight, police questioned suspects after invocations).

414. Leo & White, *supra* note 361, at 461 (citations omitted). The FBI has advised law enforcement officers to refrain from “questioning after a suspect unequivocally has invoked his right to counsel” and “interrogating before the warnings are given (with a view toward having suspects make incriminating statements and then be given the warnings, which are likely to be waived because they already have incriminated themselves).” Thomas D. Petrowski, *Miranda Revisited: Dickerson v. United States*, FBI L. ENFORCEMENT BULL., Aug. 2001, at <http://www.fbi.gov/publications/leb/2001/august2001/aug01p29.htm>. According to the FBI, these practices expose “interrogating officers and their departments to civil liability.” *Id.* As explained above in Subsections I.B.2 and I.D.1, that conclusion is wrong outside the Ninth Circuit.

415. See, e.g., Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987) (describing how a “police training manual authored by Justice Holmes’ ‘bad man of the law’” would recommend strategies to take advantage of Supreme Court-created exceptions to the *Miranda* exclusionary rule (citations omitted)); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 71 n.29 (describing police questioning “outside *Miranda*” as “[o]ne particularly troubling manifestation of . . . disrespect” for Supreme Court decisions, concluding that “[t]here is simply no way to interpret *Miranda* as a decision permitting such questioning,” and characterizing the practice as “a mockery of the constitutional right at stake”); Weisselberg, *supra* note 4, at 132 (agreeing with Alschuler and describing questioning “outside *Miranda*” as tactics of “a bad officer”).

416. See *supra* note 314 and accompanying text (discussing judicial reactions to deliberate violations of the *Miranda* rules). It is unlikely that a federal court could use its supervisory power to suppress evidence because a police officer deliberately violated the *Miranda* rules. Cf. *United States v. Payner*, 447 U.S. 727, 733-36 (1980) (holding that “supervisory power does not authorize a federal court to suppress otherwise admissible evidence” seized from a third party despite the fact that the illegal seizure was part of a deliberate plan by a government agent to violate the Fourth Amendment in order to obtain evidence).

417. See *infra* note 494 and accompanying text.

much of the public has come to view as constitutional entitlements. Rather, the points here are that neither the privilege nor *Miranda* obligates police to comply with the *Miranda* rules and that the Court has created substantial incentives for police to violate those rules, incentives that often may trump countervailing considerations.⁴¹⁸

III. *MIRANDA*'S FUTURE

Although Supreme Court forecasts may be ill-advised, I offer two predictions: that the Court soon will consider the question raised here—whether police have a constitutional obligation to comply with the *Miranda* rules—and that, if it does, it will decide that police have no such duty.

Why might the Court be inclined to consider this issue? *Cooper* and *Butts* have instructed police departments in the Ninth Circuit, which have law enforcement responsibility for almost one-fifth of the nation's population,⁴¹⁹ that they risk violating the privilege if they fail to honor a

418. Whether prosecutors properly can advise police to violate the *Miranda* rules, as some apparently have done, see Weisselberg, *supra* note 4, at 133-34 (describing the training bulletin published by the California District Attorneys Association, which suggests that police disregard *Miranda* rules), is a separate and difficult question, cf. MODEL RULES OF PROF'L CONDUCT R. 3.8(b) (2001) (requiring that prosecutors "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel"). On one hand, it appears to be appropriate for prosecutors to counsel police to engage in conduct that is not unconstitutional and may further legitimate investigatory objectives. On the other hand, it is troubling that officers of the court, sworn to uphold the Constitution, would encourage police activity that undermines the objectives of the *Miranda* Court, see *supra* notes 26-27 and accompanying text, even if it does not run afoul of the letter of the law. As my colleague, Sheri Johnson has pointed out to me, prosecutors, unlike police officers, have ready access to the Court's opinions. Those opinions make clear that decisions in which the Court has created evidentiary incentives to violate the *Miranda* rules, see *supra* Section II.A, assume that police will not do so in order to obtain a strategic advantage, see *supra* note 310 and accompanying text; *supra* notes 352-354 and accompanying text; *infra* note 538 and accompanying text.

A state appellate decision, *State v. Sosinski*, addresses prosecutorial involvement in an alleged deliberate violation of the *Miranda* rules. 750 A.2d 779 (N.J. Super. Ct. App. Div. 2000). The court held that a prosecutor committed misconduct by advising a police officer to refrain from giving a *Miranda* advisement when the officer questioned a suspect for whom he had obtained an arrest warrant. *Id.* at 784-85. As a result, in addition to requiring suppression of the resulting statement in the prosecution's case-in-chief, the court held that the statement could not be used to impeach the defendant, *id.* at 785-86, an outcome that the *Miranda* doctrine typically does not require, see *supra* Subsection II.A.2. Remarkably, the assumption on which the court's opinion rested, that a suspect for whom police have an arrest warrant is in "custody" for purposes of triggering *Miranda*, even if the suspect is unaware of the warrant, was simply wrong. *Id.* at 782-83; see, e.g., *Stansbury v. California*, 511 U.S. 318, 323-26 (1994) (holding that a police officer's subjective intention to arrest a suspect did not constitute *Miranda* "custody," and explaining that the inquiry must instead focus on whether a reasonable person in the suspect's position would have believed himself to be under arrest). That error aside, *Sosinski* is a cautionary tale for prosecutors contemplating whether to suggest to police that they should disregard the *Miranda* rules.

419. In April 2000, the combined population of the nine states in the Ninth Circuit—California (33,871,648); Washington (5,894,121); Arizona (5,130,632); Oregon (3,421,399); Nevada (1,998,257); Idaho (1,293,953); Hawaii (1,211,537); Montana (902,195); and Alaska (626,932)—was 54,350,674, or 19.3% of the national population of 281,421,906. See U.S.

suspect's assertion of *Miranda* rights.⁴²⁰ If those departments abide by that admonition, as at least some appear to have done, they will refrain from taking statements "outside *Miranda*."⁴²¹ At the same time, federal appellate courts elsewhere have sent a very different message—that police disregard of the *Miranda* rules cannot violate the privilege without later use of resulting statements.⁴²² This state of affairs demands resolution. Either West Coast police departments are forgoing legitimate investigation because of the Ninth Circuit's mistaken interpretation of *Miranda* and the privilege, or other police departments, with the misguided blessing of their federal courts, are deliberately violating suspects' rights by ignoring the *Miranda* rules. Supreme Court review is both appropriate and necessary to determine which approach is wrong.⁴²³ Indeed, near the end of the October 2001 Term, the Court agreed to hear *Chavez v. Martinez*,⁴²⁴ a case that presents the Court with the opportunity to address the closely related question whether the privilege itself can be violated by coercive interrogation absent the use of a resulting statement in a criminal case.⁴²⁵ Because, as explained

CENSUS BUREAU, CENSUS 2000 PHC-T-2, RANKING TABLES FOR STATES: 1990 AND 2000 (2001), at <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf>.

420. See *supra* text accompanying notes 184-209 (describing the Ninth Circuit decisions). The Ninth Circuit has determined, however, that a "benign" violation of the *Miranda* rules, without some associated, and as yet undefined, forceful interrogation tactics, does not violate the privilege. See *supra* note 193 and accompanying text.

421. See Weisselberg, *supra* note 220, at 1150-51 (describing the recent trend in California police and sheriff departments of advising officers not to question "outside *Miranda*" and noting that of a number of court decisions, "*Butts* appears to have had the greatest influence upon the agencies" in this regard).

422. See *supra* notes 181-182 and accompanying text (describing decisions from federal courts of appeals holding that the failure to comply with *Miranda* rules does not violate the Constitution and that a violation occurs only when the resulting statement is used in a criminal case).

423. Rule 10 of the Supreme Court Rules describes "compelling reasons" that, although "neither controlling nor fully measuring the Court's discretion" to grant petitions for writs of certiorari, "indicate the character of the reasons the Court considers." SUP. CT. R. 10. At least two are applicable here: "[A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," *id.* at 10(a), and "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court," *id.* at 10(c).

The Court denied petitions for certiorari in both *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 953 (1992), and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert. denied sub nom. Butts v. McNally*, 530 U.S. 1261 (2000). Similarly, it did not review a federal appellate court decision rejecting *Cooper*'s conclusion that police interrogation in violation of the *Miranda* rules can, at least in some cases, constitute a violation of the Fifth Amendment privilege, even if there is no later use of resulting statements. See *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir.) (en banc), *cert. denied*, 522 U.S. 1030 (1997).

424. When decided below, the case was *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001), *cert. granted sub nom. Chavez v. Martinez*, 122 S. Ct. 2326 (2002).

425. See *supra* note 203 and accompanying text (discussing the facts of the case). In *Martinez*, the Ninth Circuit held that the lower court had correctly determined that a defendant police officer sued under 42 U.S.C. § 1983 was not entitled to qualified immunity. As part of its resolution of that issue, the appellate court concluded that coercive police questioning violates

above, *Miranda* is rooted in the privilege,⁴²⁶ a Supreme Court determination in *Chavez* that use in a criminal case is a necessary precondition for a violation of the privilege likely would require that *Miranda* be interpreted in the same way. If it does address the issue, either in *Chavez* or in another case, the Court likely will rule that a violation of the privilege, *Miranda*, or both, occurs only in a criminal case. All of the evidence described in Part I—the privilege’s textual reference to a person being compelled to testify against himself “in any criminal case,” the immunity doctrine, the penalty cases, the Court’s description of the privilege in *Verdugo-Urquidez*, and *Miranda* itself, in which the Court interpreted the privilege to operate during custodial interrogation, not to prohibit compulsion—points in that direction. In addition, despite occasional language to the contrary in some Supreme Court decisions, the Court’s most recent descriptions of the privilege and *Miranda*, including the *Dickerson* opinion, indicate that it now views both as rules of admissibility.⁴²⁷

Even if the Court does not resolve the question of when a violation of the privilege or *Miranda* occurs, lower court decisions rejecting § 1983 claims based on violations of the *Miranda* rules⁴²⁸ may have a similar effect. Although garnering less attention than a Supreme Court ruling, they nonetheless signal to police that the decision whether to comply with the *Miranda* guidelines is one driven by a cost/benefit analysis, not by fidelity to the Constitution.⁴²⁹

The remainder of this Article assumes that the predicted Supreme Court action comes to pass or that the Court leaves the lower court decisions undisturbed. If so, what does the future hold for *Miranda*? Three possibilities are presented and discussed: one in which the Court keeps

both the privilege and due process even if resulting statements are never used in a criminal prosecution. *Martinez*, 270 F.3d at 857. It seems likely that the Supreme Court will address both the privilege and due process theories of liability.

426. See *supra* Subsection I.B.1 (describing the relationship between the privilege and *Miranda*).

427. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that “*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation”); *United States v. Balsys*, 524 U.S. 666, 691 n.12 (1998) (quoting a passage from *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), in which the Court described the privilege as “a fundamental trial right” and noted that “[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial”); *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (noting that “*Miranda* safeguards ‘a fundamental trial right’” (quoting *Verdugo-Urquidez*, 494 U.S. at 264)). Although Justice Ginsburg expressed the view that “the Fifth Amendment privilege against self-incrimination prescribes a rule of conduct” in her dissenting opinion in *Balsys*, no other Justice joined that opinion. 524 U.S. at 701 (Ginsburg, J., dissenting).

428. See *supra* notes 181-182 and accompanying text (describing the § 1983 cases).

429. Indeed, although its message is more cautionary, even the Ninth Circuit appears to have determined that police officers who violate the *Miranda* requirements “in a benign way, without coercion or tactics that compel [a suspect] to speak” do not violate the Constitution. *Cooper v. Dupnik*, 963 F.2d 1220, 1244 (9th Cir.) (en banc), cert. denied, 506 U.S. 953 (1992); see also *supra* note 193.

intact both *Miranda* and the decisions giving police reason to violate its requirements, a second in which the Court overturns *Miranda*, and a third in which the Court reconciles *Miranda* with its other Fifth Amendment jurisprudence, treating statements compelled by the pressures of custodial interrogation in the same manner as other compelled statements—such as immunized testimony—or offering rationales for differential treatment more persuasive than those that it has provided to date. Although the third possibility is the one most consistent with the privilege, the first appears to be the most likely future for *Miranda*.

A. *Miranda as a False Promise of Protection*

If the Court determines that *Miranda* is a rule of admissibility only (or leaves lower court decisions to that effect untouched), it nonetheless may both keep *Miranda* in place and do nothing to remove the incentives that it has created for police to violate the *Miranda* rules. This will make clear to police that they are free to disregard the *Miranda* rules whenever they deem it advantageous, which, as noted above, will be often.⁴³⁰ Such a message could promote widespread and routine noncompliance with the *Miranda* rules.

This outcome is both troubling and likely. It is troubling for several reasons. It would undermine the very thing that the *Miranda* Court had hoped to accomplish—the elimination, or at least the reduction, of the pressure inherent in custodial interrogation.⁴³¹ Although the *Miranda* Court employed a constitutional provision that does not impose direct restraints on police, the *Miranda* Court's objective was to cause police to take steps to reduce the pressures of custodial interrogation. By both making clear that there is no constitutional obligation to follow the *Miranda* rules, and preserving the doctrinal incentives to disregard them, the Court would encourage police to do the opposite—to refrain from taking the steps that *Miranda* deemed crucial to dispel compulsion.⁴³²

This could *increase* the pressure on suspects to answer questions. Consider the perspective of a suspect subject to custodial interrogation: Like much of the rest of American society, he likely will believe that police have an obligation both to explain his "*Miranda* rights" to him before questioning and to honor his assertion of those rights. If police instead

430. See *supra* Subsections II.B.1.b, II.B.2.b.

431. See, e.g., Schulhofer, *Miranda's Practical Effect*, *supra* note 370, at 561 ("*Miranda's* stated objective was not to eliminate confessions, but to eliminate compelling pressure in the interrogation process.>").

432. Of course, one could take the view that encouraging police to violate the *Miranda* rules is a positive good, because it enhances law enforcement efforts. See *supra* note 370. If so, greater latitude to disregard *Miranda* would be a desirable outcome. But, as explained in the text, there are more forthright ways to achieve that objective.

question him without warnings or continue the interrogation despite his request to remain silent or consult counsel, he reasonably may conclude that they have no regard for his rights or the laws governing custodial interrogation. That conclusion may generate fear that any refusal to comply with demands for answers may trigger lawless police retaliation. The realization that the promise of *Miranda* is false will make the police questioning more frightening and coercive.

Suspects will not be the only ones misled if the Court preserves *Miranda*, while both permitting and encouraging violations of the *Miranda* guidelines. The public at large believes that police must comply with those requirements.⁴³³ Most Americans do not learn or grasp the subtle distinction between rules addressing police conduct and those governing admissibility. Few are aware of the legal incentives for police to violate the *Miranda* rules.⁴³⁴ Even if the predicted Supreme Court action comes to pass, retaining *Miranda* but making clear that it governs only admissibility, many will continue to believe that police are obliged to comply with the *Miranda* rules.⁴³⁵ That mistaken view will reduce the likelihood of reform of police interrogation practices. Many citizens would consider it unacceptable for the Supreme Court both to permit and entice police to disregard the *Miranda* rules. But, as long as the Court leaves the well-known *Miranda* decision in place, it is unlikely that many will realize that it has done exactly that.⁴³⁶

However undesirable, this outcome appears likely. First, there is no reason to believe that the Court will overturn *Miranda* so soon after having determined in *Dickerson* that it is a constitutionally based decision.⁴³⁷ Thus, the promise of warnings and the right to terminate police questioning will remain intact. Second, *Dickerson* gives no indication that any member of the Court is inclined to rethink the decisions permitting impeachment with statements taken in violation of the *Miranda* rules or the admission of fruits

433. See *supra* notes 2-3 and accompanying text.

434. For a discussion of the differences between the police's and the general public's access to information about rules governing police conduct and rules governing the consequences of violations of conduct rules, see Steiker, *supra* note 3, at 2535-40 (comparing police training in academies and continuing education classes, education through litigation, and interaction with prosecutors, with public exposure to incomplete and possibly inaccurate media reports and depictions of rights in popular culture).

435. See *id.* at 2537-38 (explaining that "members of the public at large" are more likely to be familiar with and understand rules governing police conduct than those addressing admissibility and other judicial consequences of misconduct).

436. Cf. Alschuler, *supra* note 415, at 1452-53 ("When two-thirds of a prior decision disappears slowly in half a dozen small bites, the public's perception of the Supreme Court may not change very much.").

437. See Dorf & Friedman, *supra* note 415, at 63 ("For all the ambiguity *Dickerson* leaves, it makes clear that *Miranda* is here to stay."); Leo, *supra* note 366, at 1011 ("After all, for the foreseeable future, *Miranda* is here to stay.").

of those statements.⁴³⁸ Although the *Dickerson* Court rejected the lower court's conclusion that decisions like *Harris* and *Elstad* support the view that Congress can overturn *Miranda*,⁴³⁹ it nonetheless embraced *Harris* and *Elstad*.⁴⁴⁰ Thus, *Dickerson* suggests that the promise will continue to ring false.⁴⁴¹

There is precedent for a situation like the one described here—where the Court maintains or expands substantive constitutional guarantees, as the *Dickerson* Court did with *Miranda*, but at the same time weakens or eviscerates doctrines necessary for enforcement. In *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*,⁴⁴² Professor Carol Steiker makes a persuasive case that the Burger and Rehnquist Courts left some significant Warren Court rules governing police conduct largely undisturbed, while at the same time “waging counter-revolutionary war against the Warren Court’s constitutional ‘remedies’ of evidentiary exclusion and its federal review and reversal of convictions.”⁴⁴³ For example, in the area of Fourth Amendment doctrine,⁴⁴⁴ Steiker reports

438. See Dripps, *supra* note 23, at 2 (noting that the *Dickerson* “opinion did not repudiate prior cases admitting evidence derived from *Miranda* violations or allowing impeachment with *Miranda*-tainted statements”).

439. *Dickerson v. United States*, 530 U.S. 428, 441 (2000).

440. See *id.* (describing *Harris* as one of its “decisions [that] illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable” and *Elstad* as “simply recogniz[ing] the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment”). Lower federal and state courts have concluded that *Elstad* remains good law after *Dickerson*. See, e.g., *United States v. DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001) (concluding that *Dickerson* apparently rejected the view that it cast doubt on *Elstad*); *United States v. Orso*, 266 F.3d 1030, 1034 & n.3 (9th Cir. 2001) (en banc) (applying *Elstad* after *Dickerson* and noting that “*Dickerson* seems to signal that the distinction set forth in *Elstad* [between *Miranda* violations, which do not require suppression of fruits, and Fourth Amendment violations, which do] continues unabated”); *United States v. Faulkingham*, 156 F. Supp. 2d 60, 69 (D. Me. 2001) (noting that “*Elstad* . . . remains a piece of the Fifth Amendment exclusionary rule puzzle” despite *Dickerson*); *United States v. Bin Laden*, No. S(7)98CR.1023, 2001 WL 30061, at *3 n.4 (S.D.N.Y. Jan. 2, 2001) (noting that *Dickerson* “held that a *Miranda* violation is a constitutional violation but did not otherwise disturb its ruling in *Elstad*”); *People v. Brewer*, 96 Cal. Rptr. 2d 786, 795 n.8 (Ct. App. 2000) (noting that *Dickerson* “reaffirmed the validity of the ruling in *Elstad* that the fruit of the poisonous tree doctrine . . . does not apply in cases involving non-coercive violations of *Miranda*”); *Raras v. State*, 780 A.2d 322 (Md. Ct. Spec. App. 2001) (assuming that *Elstad* remains intact after *Dickerson*); *State v. Fakes*, 51 S.W.3d 24, 32 (Mo. Ct. App. 2001) (determining that the Court decided *Dickerson* as it did “without overturning *Elstad* or other cases seeming to loosen the requirements of *Miranda*”); *State v. Walton*, 41 S.W.3d 75, 88-89 (Tenn. 2001) (determining that “*Dickerson* did not overturn *Tucker* or *Elstad*, nor did it repudiate the reasoning adopted by these cases”).

441. See Kamisar, *Foreword*, *supra* note 23, at 894 (“[A]lthough *Dickerson* seemingly repudiated the premises on which some *Miranda*-debilitating decisions are based, the exceptions to *Miranda* are going to remain in place.”).

442. Steiker, *supra* note 3.

443. *Id.* at 2470. Professor Yale Kamisar also has identified the significance of Steiker’s work in this context. See Kamisar, *Confessions*, *supra* note 4, at 476.

444. Steiker’s article includes analysis of the *Miranda* and *Massiah* doctrines as well. See Steiker, *supra* note 3, at 2472-85. As explained here and elsewhere, those doctrines, unlike the Fourth Amendment, are rules governing admissibility, not police conduct, see *supra* Section I.B

ways in which the Burger and Rehnquist Courts “have explicitly endorsed and expanded upon the [Warren Court’s] preference for warrants.”⁴⁴⁵ In contrast to this somewhat charitable view toward preexisting Fourth Amendment doctrine governing police conduct,⁴⁴⁶ Steiker describes the Court’s efforts to deny criminal defendants benefits following violations of those rules by narrowing the universe of those who have “standing” to contest the admission of evidence,⁴⁴⁷ permitting the prosecution to introduce evidence that police seize in violation of the Fourth Amendment, but in good faith reliance on a warrant,⁴⁴⁸ limiting the reach of the “fruit of the poisonous tree” doctrine, which requires suppression of evidence derived from Fourth Amendment violations;⁴⁴⁹ allowing impeachment of

(contending that *Miranda* is a rule of admissibility only); Loewy, *supra* note 25, at 916-33 (contending that both *Miranda* and *Massiah* are rules of admissibility), a point that Steiker acknowledges, *see* Steiker, *supra* note 3, at 2473 n.26. Although Steiker nonetheless treats these decisions as analogous to Fourth Amendment decisions addressing police conduct, discussion here is limited to her analysis of Fourth Amendment doctrine.

445. Steiker, *supra* note 3, at 2486.

446. Steiker concedes that the Burger and Rehnquist Courts did diminish substantive Fourth Amendment rights in several ways, *see id.* at 2490-503 (identifying, for these purposes, the doctrines involving “definition of voluntary cooperation with the police”—defining what police conduct constitutes a “seizure” of a person and when police have obtained “consent” to search, defining “reasonable expectations of privacy” for purposes of determining whether the protections of the Fourth Amendment apply, and identifying whether “special needs” of society other than crime investigation justify warrantless searches and searches with either little or no individualized suspicion), but concludes that the differences between the Warren Court’s Fourth Amendment doctrine governing police conduct and that of the Burger and Rehnquist Courts “are not nearly as extreme as the differences in [the rules governing the in-court consequences of violations of the rules governing conduct] that have developed over the same period of time,” *id.* at 2503.

Since publication of Steiker’s article, several Rehnquist Court opinions have strengthened some of these substantive doctrines, lending support to Steiker’s thesis. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27, 35-40 (2001) (determining that use of a thermal imaging device to detect heat emission from a residence constituted a “search” under the reasonable expectation of privacy test and requiring the police to obtain a warrant); *Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (holding a hospital’s nonconsensual testing of urine of pregnant patients for drugs to be unconstitutional under the “special needs” analysis when the results were shared with law enforcement); *City of Indianapolis v. Edmund*, 531 U.S. 32, 40-48 (2000) (ruling that suspicionless traffic stops to interdict drugs are not within the “special needs” exception).

447. Steiker, *supra* note 3, at 2505-11 (describing *Rakas v. Illinois*, 439 U.S. 128 (1978), in which “the Court held that a passenger in a car had no standing to contest the legality of a search that led to the seizure of items from the glove compartment and the area under the seat”; *Rawlings v. Kentucky*, 448 U.S. 98 (1980), in which the Court determined that ownership of an item seized is alone inadequate to demonstrate standing; and *United States v. Salvucci*, 448 U.S. 83 (1980), which held that possession alone does not establish standing).

448. *Id.* at 2511-15 (describing *United States v. Leon*, 468 U.S. 897 (1984), which permitted the introduction of evidence seized in good faith reliance on a search warrant not supported by probable cause, and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), which held that the exclusionary rule did not bar the use of evidence that police obtained in good faith reliance on a technically defective search warrant).

449. *Id.* at 2515-18 (describing *Nix v. Williams*, 467 U.S. 431 (1984), a Sixth Amendment decision with apparent application in the Fourth Amendment context as well, which held that evidence derived from a constitutional violation is admissible if police inevitably would have discovered it by lawful means; *Murray v. United States*, 487 U.S. 533 (1988), which permitted introduction of evidence that police obtained from a legal source—in *Murray*, a valid search warrant—even when the same police officers earlier had discovered the same evidence during an

criminal defendants with illegally seized evidence;⁴⁵⁰ and eliminating habeas corpus review of Fourth Amendment claims.⁴⁵¹ Steiker warns that when the Court limits the adverse consequences of violations of the substantive rules, it risks an increase in violations of those rules.⁴⁵²

The Court's *Batson* doctrine provides another example. The Court has announced a robust substantive rule prohibiting litigants from exercising discriminatory peremptory challenges to potential jurors.⁴⁵³ The prohibition binds prosecutors,⁴⁵⁴ civil litigants,⁴⁵⁵ and even criminal defense attorneys.⁴⁵⁶ It bars discrimination based on race,⁴⁵⁷ sex,⁴⁵⁸ and ethnicity⁴⁵⁹ and applies without regard to the characteristics of the parties in the case, instead protecting the rights of potential jurors.⁴⁶⁰ But, at the same time, the Court has settled for a feeble enforcement mechanism. If accepted as genuine by a trial court, any facially neutral explanation offered by an attorney who has made a contested peremptory challenge, no matter how absurd, passes constitutional muster.⁴⁶¹

illegal warrantless entry; and *New York v. Harris*, 495 U.S. 14 (1990), in which the Court permitted use of a confession following an illegal warrantless entry into a suspect's home by finding that because the confession occurred at the police station, it was not fruit of the illegal entry).

450. *Id.* at 2519-21 (describing *United States v. Havens*, 446 U.S. 620 (1980), which permitted the government to use evidence seized in violation of the Fourth Amendment to impeach a defendant's trial testimony, even if the testimony was about the offense at issue in the case and the prosecution elicited it for the first time on cross-examination, as long as the testimony related to the defendant's direct examination testimony, but noting that in *James v. Illinois*, 493 U.S. 307 (1990), the Court rejected a proposed use of illegally seized evidence to impeach defense witnesses).

451. *Id.* at 2531 (describing *Stone v. Powell*, 428 U.S. 465 (1976)).

452. *Id.* at 2517-18 (describing the Court's creation of "perverse incentives for law enforcement agents to knowingly violate Fourth Amendment norms").

453. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

454. *Id.* at 98 (describing the prosecutor's obligation to "articulate a neutral explanation related to the particular case to be tried" if a defendant makes out a prima facie showing that the prosecutor's peremptory challenge is based on race).

455. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628-31 (1991).

456. *See Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

457. *See, e.g.*, *Batson*, 476 U.S. at 79.

458. *See J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994).

459. *See Hernandez v. New York*, 500 U.S. 352, 362-63 (1991) (plurality opinion) (assuming that *Batson* prohibits efforts to exclude Latino potential jurors).

460. *See Powers v. Ohio*, 499 U.S. 400, 416 (1991) (holding that a white defendant is entitled to make a *Batson* challenge when the prosecutor exercises a peremptory challenge against an African-American potential juror).

461. *See Purkett v. Elem*, 514 U.S. 765, 769 (1995) (per curiam) (holding that a prosecutor's stated reason for a peremptory challenge can satisfy *Batson* if it is legitimate, but a legitimate reason "is not a reason that makes sense, but a reason that does not deny equal protection"); *Hernandez*, 500 U.S. at 360 (plurality opinion) ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."). As Professor Sheri Johnson has put it, "If prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar examinations are too easy." Sheri Lynn Johnson, *The Language and Culture (Not To Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993).

To be sure, the Court's approaches to the Fourth Amendment and to the *Batson* doctrine are somewhat different. In the former context, the Court has enticed police to violate the rules by weakening the sanctions. In the latter, the Court has enabled litigants to disregard the rules by offering a simple way to escape detection. But the approaches share a critical feature—both announce to the public at large what appear to be robust constitutional protections while signaling to those to whom the rules are directed that they often can benefit from violations. The apparently contradictory approach of keeping the *Miranda* rules in place, while informing police that they can disregard them and benefit from doing so, would be consistent with what the Court has done with the Fourth Amendment and *Batson*.⁴⁶² But, for two reasons, doing this in the *Miranda* context raises unique concerns.

First, although the rules involving the consequences of Fourth Amendment violations may create some incentives for police to commit violations, there are powerful countervailing deterrents. Significantly, the Court requires suppression of fruits of Fourth Amendment violations,⁴⁶³ and imposes on the prosecution the burden of demonstrating either that its evidence is untainted by such violations⁴⁶⁴ or that an exception to the fruits rule applies.⁴⁶⁵ As explained above, as the lower courts have interpreted the Supreme Court's *Miranda* decisions, there is no similar sanction for violations of the *Miranda* rules.⁴⁶⁶ In addition, police who violate a Fourth Amendment rule usually cannot undo their transgression by later complying with constitutional requirements. Once police illegally seize evidence, they cannot avoid suppression by then obtaining judicial authorization for the earlier intrusion.⁴⁶⁷ In contrast, *Elstad* permits police to cure an earlier

462. Some have argued that the Court already has engaged in an evisceration of *Miranda*. See, e.g., Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 745-86 (1999) (describing "inroads" into the *Miranda* doctrine); Steiker, *supra* note 3, at 2521-26.

463. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963) (requiring the suppression of verbal declarations and physical evidence derived from earlier violations of the Fourth Amendment as "fruit of the poisonous tree").

464. See, e.g., *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (noting that "the burden of showing admissibility [of the defendant's statement following an illegal arrest] rests, of course, on the prosecution").

465. The Court recognizes three exceptions to the doctrine requiring suppression of fruit of the poisonous tree: the independent source rule, see, e.g., *Murray v. United States*, 487 U.S. 533 (1988), the attenuation doctrine, see, e.g., *Brown*, 422 U.S. at 590, and the inevitable discovery doctrine, see, e.g., *Nix v. Williams*, 467 U.S. 431 (1984).

466. See *supra* note 355 and accompanying text.

467. The Court has carved out an exception. In *Murray v. United States*, 487 U.S. 533, police had probable cause to believe that there was marijuana in a warehouse. They illegally entered without a warrant and found the drugs. *Id.* at 535-36. Without moving the marijuana, they maintained surveillance on the warehouse and obtained a warrant with an affidavit that made no mention of either the earlier entry or any observations made during the entry. *Id.* The Court held that the later seizure of the marijuana pursuant to the warrant was an independent source enabling the prosecution to introduce the marijuana at trial despite the Fourth Amendment violation. *Id.* at

failure to give *Miranda* warnings.⁴⁶⁸ In short, the Court has made it more attractive for police to violate the *Miranda* rules than to violate the Fourth Amendment.

Second, both the Fourth Amendment and *Batson* establish norms governing police and litigant conduct. Whether or not a court will detect or sanction a violation, it is unconstitutional and thus impermissible to conduct a warrantless search of a home or to discriminate against a potential juror on the basis of race, sex, or ethnicity. Some actors will follow the rules simply because they recognize that they have a constitutional obligation to do so.⁴⁶⁹ But, because *Miranda* is a rule of admissibility only, there is no equivalent constitutional norm obligating police to give warnings or terminate interrogation upon a suspect's request. A police officer who disregards *Miranda* does nothing wrong. Because there is no guiding constitutional standard, there is a greater need for robust enforcement in the *Miranda* context, a need that the Court's decisions have both ignored and left unfilled.

B. Discarding *Miranda*

Alternatively, the Court could overturn *Miranda*. Although, as noted above, this seems unlikely in the wake of *Dickerson*, this option would be preferable to the Court preserving *Miranda* as window dressing while informing police that they are free to violate the *Miranda* rules and encouraging them to do so. Because a decision overturning *Miranda* likely would garner considerable media attention, it would have the virtue of correcting misconceptions that suspects and the public at large may now harbor about the protection that *Miranda* provides. There may be other advantages as well.

First, as some scholars have suggested, a Supreme Court decision overruling or limiting *Miranda* could spark legislation or administrative rules imposing more effective restraints on police interrogation practices.⁴⁷⁰

541-44. In *Murray*, the Court permitted use of the evidence only because there was no proof that the constitutional transgression had an effect on the later, constitutionally permissible tactics that led police to "rediscover" the same evidence. In the *Miranda* context, the Court has refused to conduct a similar taint analysis. See *supra* notes 345-346 and accompanying text (describing the rule from *Oregon v. Elstad*).

468. See *supra* note 357 and accompanying text.

469. See, e.g., Steiker, *supra* note 3, at 2544 (acknowledging that "there may be some police officers who will attempt to obey the law as they understand it, regardless of any sanction that may be imposed").

470. See, e.g., Cassell, *supra* note 131, at 552-53 (describing ways in which the *Miranda* decision frustrated reform efforts and concluding that "[n]othing is likely to change in the future so long as *Miranda* remains on the books"); Klein, *supra* note 153, at 1071 (arguing that by keeping *Miranda* intact, "*Dickerson* forecloses any opportunity for improvement in protecting the privilege against self-incrimination"); Stuntz, *supra* note 17, at 976 (contending that the *Dickerson* Court's affirmation of *Miranda* represents an "opportunity missed" because *Miranda*'s

Although its supporters oppose rejection or weakening of *Miranda*, they too embrace reform.⁴⁷¹ Even if the *Miranda* rules do reduce the compulsion inherent in custodial interrogation,⁴⁷² they leave troubling features of the interrogation process untouched.⁴⁷³

For example, *Miranda* does nothing to assist courts in resolving factual disputes between police and suspects about what occurs in the secrecy of the interrogation room—both before a *Miranda* waiver and after. Courts and juries often are left to reconstruct the circumstances surrounding a suspect's decision to make a statement and the substance of the statement itself from the biased and conflicting oral testimony of the police and the suspect.⁴⁷⁴ In addition, although *Miranda* establishes guidelines for what police should say to suspects before interrogation, it does not address their use of tactics designed to diminish the warnings and minimize the importance of the suspect's decision to waive the *Miranda* rights.⁴⁷⁵ Further, for the most part, *Miranda*'s role comes to an end with a valid waiver,⁴⁷⁶ and thus does nothing to control police interrogation practices that may shape the substance and the reliability of a suspect's statement.

continued "existence may well forestall more serious, and more successful, regulation of police questioning"); see also Leo, *supra* note 366, at 1022 ("Miranda also reduces the pressure on police to reform their practices on their own initiative.").

471. See, e.g., Schulhofer, *Miranda's Practical Effect*, *supra* note 370, at 556-57 (noting that videotaping would be a useful supplement to *Miranda* warnings by providing a record of the interrogation process and the suspect's statement and by inhibiting brutality).

472. Some scholars have questioned whether *Miranda* does perform that function. See, e.g., Leo, *supra* note 366, at 1021 ("The reading of rights and the taking of waivers has become, seemingly, an empty ritual, and American police continue to use the same psychological methods of persuasion, manipulation, and deception that the Warren Court roundly criticized in *Miranda*."); see also *id.* at 1027 ("Contrary to the visions of its creators, *Miranda* does not meaningfully dispel compulsion inside the interrogation room.").

473. See, e.g., White, *supra* note 366, at 1246 (contending that "the extent to which *Miranda*'s safeguards protect suspects from pernicious interrogation practices is extremely limited").

474. See, e.g., Cassell, *All Benefits*, *supra* note 370, at 1118 (noting that "*Miranda* does nothing whatsoever to mitigate the pitfalls of the swearing contest" (quoting Schulhofer, *supra* note 155, at 880-85)).

475. For a discussion of the strategies that police use to persuade suspects to waive their *Miranda* rights or retract invocations of those rights, see Leo & White, *supra* note 361, at 431-50. The authors note that the Supreme Court doctrine involving the permissibility of tactics that deemphasize "the significance of the *Miranda* rights or offer express or implied inducements that increase the likelihood of a waiver . . . is unclear" but that "lower courts have generally interpreted that doctrine so as to provide interrogators with considerable leeway." *Id.* at 412-13; see also Leo, *supra* note 366, at 1016-20 (describing the strategies). The *Miranda* Court forbade the use of threats, tricks, or cajolery to induce a waiver, but did not further describe the police conduct that it meant to prohibit. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

476. See Leo, *supra* note 366, at 1015 ("*Miranda* offers very little, if any, meaningful protection, once a suspect has waived his rights."). Suspects can invoke their *Miranda* rights after they have begun to make a statement, see *Miranda*, 384 U.S. at 473-74 (holding that a suspect's indication during questioning that he wishes to remain silent renders any statement resulting from continued interrogation compelled), but they rarely do so, see, e.g., Leo, *supra* note 366, at 1015 (noting that "very few suspects subsequently invoke their *Miranda* rights after they have been waived").

The *Miranda* Court supported its conclusion that custodial interrogation is inherently compelling by describing, with apparent distaste, a host of interrogation practices described in police training manuals: the privacy and secrecy of police questioning, which “results in a gap in our knowledge as to what in fact goes on in the interrogation rooms”;⁴⁷⁷ persistent and uninterrupted interrogation;⁴⁷⁸ questioning during which police confidently assume the suspect’s guilt, often coupled with false expressions of sympathy couched as tempting suggestions of excuses upon which the suspect should rely, causing the suspect to admit unwittingly criminal conduct;⁴⁷⁹ the use of the “good cop/bad cop” approach or, as the Court described it, the “Mutt and Jeff” routine, in which one interrogator befriends the suspect while another attempts to intimidate him;⁴⁸⁰ confronting the suspect with false claims of incriminating evidence;⁴⁸¹ and the isolation of the suspect from any outside support.⁴⁸² Over thirty years later, students of police interrogation bemoan the same practices, demonstrating that *Miranda* did nothing to end them.⁴⁸³

Of course, there is no guarantee that rejection of *Miranda* would spark reform, or that reform measures would either counteract the coercive nature of police interrogation, thus combating the problem that the *Miranda* Court attempted to solve, or address other concerns about police interrogation. But it may be a risk worth taking. Even *Miranda*’s defenders acknowledge that *Miranda* and the due process approach alone are inadequate to prevent abusive police interrogation.⁴⁸⁴ And a number of commentators have come to view *Miranda* as an impediment to reform.⁴⁸⁵ If Parts I and II are correct, and the Court does not curtail the incentives for police to violate the

477. *Miranda*, 384 U.S. at 448.

478. *Id.* at 450-51.

479. *Id.* at 451-52.

480. *Id.* at 452.

481. *Id.* at 453.

482. *Id.* at 455.

483. See, e.g., Leo, *supra* note 3, at 277-79 & tbl.5 (describing the frequency of various interrogation techniques observed during a study that included appeals to suspects’ self-interest, offers of moral or psychological excuses, confrontation with false evidence of guilt, and minimization of moral seriousness of the offense); Schulhofer, *Miranda’s Practical Effect*, *supra* note 370 (describing the ineffectiveness of *Miranda*); Weisselberg, *supra* note 4, at 153-59 (describing the practices that current training materials recommend and contending that “the underlying psychology of police interrogation has not changed since 1966”).

484. See, e.g., Schulhofer, *supra* note 155, at 869-72 (describing weaknesses in the due process approach); *id.* at 881-82 (describing *Miranda*’s shortcomings as including its failure to regulate the “manner in which police could deliver warnings and obtain waivers,” thus enabling “manipulation of the weak and vulnerable,” as well as its failure to “mitigate the pitfalls of the swearing contest”); Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 460 (noting that *Miranda* “did not eliminate all possibilities for abusive interrogation,” that it “stopped far short of barring all pressured or ill-considered waivers of fifth amendment rights,” and that it “did nothing at all about police dominance of the inevitable swearing contest over actual events in the interrogation room”).

485. See *supra* note 470 and accompanying text.

Miranda rules, *Miranda* cannot play the role expected of it, much less address other troubling interrogation practices. Under these circumstances, there would be little to lose by discarding it. Even Professor Yale Kamisar, one of *Miranda*'s staunchest and most effective defenders, concedes that if the fruits of deliberate violations of *Miranda* are admissible, "we should simply give *Miranda* a 'respectful burial.'"⁴⁸⁶

Second, even if overturning *Miranda* would not generate legislative reform, it may prompt some courts to pay closer attention to police interrogation practices. Under current doctrine, a defendant can challenge the methods that police used to obtain his statement by claiming a violation of the *Miranda* rules and by alleging a due process violation.⁴⁸⁷ Although the latter claim is supposed to trigger a judicial evaluation of all of the circumstances surrounding the statement,⁴⁸⁸ in practice, if the prosecution persuades a court that police have complied with the *Miranda* requirements, the court is likely to find that there has been no due process violation.⁴⁸⁹ But adherence to the *Miranda* rules does not guarantee compliance with due process. Much can and does occur in an interrogation room, both before police advise a suspect of his *Miranda* rights, and between the time a suspect waives his rights and the time that he gives or adopts the final version of his statement to police. As long as *Miranda* remains in place, so will the temptation for courts to use the bright line of *Miranda* compliance as a surrogate for the more difficult, time-consuming, and thorough due process analysis.⁴⁹⁰ In addition, in cases in which police have procured *Miranda* waivers, especially signed waivers, defense attorneys may be inclined either to pay little attention to or to forgo altogether due process

486. Kamisar, *Confessions*, *supra* note 4, at 480 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Harlan, J., concurring)).

487. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (noting that courts continue to test confessions under both due process and *Miranda*). If a suspect makes a statement after the initiation of formal proceedings, he can challenge its admission on Sixth Amendment right-to-counsel grounds as well. See *supra* notes 31-32 and accompanying text. In addition, suspects can move to suppress statements that are the fruit of Fourth Amendment violations. See *supra* note 367.

488. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."); *Culombe v. Connecticut*, 367 U.S. 568, 606 (1961) (stating that "a detailed account . . . is unavoidable").

489. See *supra* notes 365-366 and accompanying text (describing courts' rejection of due process challenges whenever there is compliance with *Miranda* rules).

490. See *Leo*, *supra* note 366, at 1025 (noting data supporting the view that "as long as *Miranda* warnings were given, courts ignored interrogation misconduct, freeing the police to coerce suspects as long as they had first Mirandized them"); White, *supra* note 366, at 1219-20 (reporting that a survey of confession cases suggested that "[a] finding that the police have properly informed the suspect of his *Miranda* rights thus often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices").

challenges to postwaiver statements, allocating their resources to other issues.⁴⁹¹

If there were no *Miranda* doctrine, some defense attorneys might litigate due process claims more often and vigorously, and some courts might scrutinize police interrogation practices more carefully. That oversight could shed light on the full range of police conduct during custodial interrogation, both before and during the time when a suspect makes a statement. It may prompt courts to give more serious consideration to the subtle pressures, deception, and other psychological ploys that police use to obtain and shape suspects' statements. This could enable defendants to challenge the propriety of questionable interrogation practices, and, by identifying impermissible tactics, promote the development of guidelines for the police.⁴⁹²

Third, although not all observers would consider this outcome advantageous, at least some criminal defendants might fare better in their efforts to suppress evidence if there were no *Miranda* doctrine. Most judges now sitting ascended to the bench well after *Miranda* became the law in 1966. They have come to expect compliance with the *Miranda* rules. With *Miranda* intact, they can sanction noncompliance by finding a *Miranda* violation and suppressing the defendant's statement in the prosecution's case-in-chief. As explained above, this leaves the prosecution free to impeach the defendant with the statement and to use fruits derived from it.⁴⁹³ If judges who expect police to follow the *Miranda* rules no longer have the *Miranda* doctrine available to express their displeasure when police engage in questionable interrogation practices, some may employ the only remaining sanction by finding that, under all of the surrounding circumstances, police violated due process.⁴⁹⁴ Because such a finding would

491. See Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 496 (1998) (contending that "*Miranda* exerts a centrifugal force on defense counsel" and that "it diverts attention from the critical issue whether the confession was the product of a constitutional violation, rather than of the 'prophylactic' *Miranda* doctrine"); cf. Schulhofer, *supra* note 155, at 877-78 (lamenting that the court and counsel sometimes overlook the due process test and focus only on a *Miranda* claim).

492. Professor Welsh White contends that there is a trio of interrogation practices that the Court should condemn as inconsistent with due process because they are likely to produce untrustworthy confessions: threats of punishment and promises of leniency, threats of adverse consequences to friends or loved ones, and misrepresentations about evidence incriminating the suspect. See White, *supra* note 366, at 1230-46.

493. See *supra* Subsections II.A.2-3.

494. Although a violation of the *Miranda* rules is not itself enough to establish a due process violation, see *supra* note 128 and accompanying text, such a violation is a significant factor in the due process calculus, see *supra* note 127 and accompanying text. It is not difficult for a court inclined to find a due process violation to characterize other features of a challenged interrogation as overly aggressive, coupling them with a violation of the *Miranda* rules to support a finding of a due process violation.

The Ninth Circuit's decision in *Henry v. Kernan*, in which a habeas corpus petitioner challenged his state court conviction, demonstrates how that process could work. 197 F.3d 1021 (9th Cir. 1999). In *Henry*, police deliberately disregarded the defendant's request to speak with an

foreclose all prosecutorial use of the statement and its fruits, including use to impeach the defendant's trial testimony, it would be more attractive to a defendant than would the determination of a *Miranda* violation.⁴⁹⁵

C. *Miranda as an Interpretation of the Privilege*

Although a criminal justice system without *Miranda* may be preferable to one with an ineffective and misleading *Miranda* doctrine, there is another option. The Court could reconcile *Miranda* with its constitutional roots, treating it as an application of the Fifth Amendment privilege rather than as a separate, only loosely related body of law. In other words, the Court could move away from what Professor Stephen Schulhofer has described as its "Fifth Amendment exceptionalism, under which the standards applicable to police interrogation are kept distinct from the standards applicable to all other official questioning of witnesses and suspected offenders."⁴⁹⁶ Although Professor Schulhofer may not agree, Part I of this Article describes one important way in which the Court should square *Miranda* with the Fifth Amendment—by acknowledging that *Miranda*, like the privilege, addresses admissibility only and thus does not prohibit police from using whatever compulsion is inherent in custodial interrogation to obtain statements from suspects.⁴⁹⁷ In order to harmonize *Miranda* with the privilege more fully, the Court would have to rethink at least two other aspects of *Miranda* doctrine: (1) the decisions weakening the *Miranda* exclusionary rule, thereby creating incentives for police to violate the requirements that they give warnings and honor invocations, and (2) the so-called "public safety" exception to *Miranda*.

attorney during interrogation. *Id.* at 1025. Although both the state courts and the federal district court had determined that the resulting statements were nonetheless voluntary and thus admissible to impeach the defendant, the Ninth Circuit disagreed. Rejecting the factual findings of the other reviewing courts that the relatively brief interrogation "was conducted calmly in a relaxed setting," *id.* at 1027, the Ninth Circuit determined that "the slippery and illegal tactics of the detectives overcame Henry's will," *id.*

495. See *supra* note 283 (describing the exclusionary rule for coerced confessions). For an argument that criminal defendants would fare better if *Miranda*-like warnings were neither required nor probative of the voluntariness of a confession, see Garcia, *supra* note 491, at 496-504.

496. Schulhofer, *supra* note 134, at 941 (emphasis omitted). Professor Dripps also has discussed the "major inconsistencies between the *Miranda* cases and the formal-compulsion Fifth Amendment cases." Dripps, *supra* note 23, at 63; see also Dripps, *supra* note 266, at 27-43 (making efforts to reconcile the Court's approach to statements taken in violation of *Miranda* rules with its approach to statements compelled in other contexts).

497. To my knowledge, Professor Schulhofer has not directly addressed the question of whether the privilege and *Miranda* govern police conduct or only admissibility. At times, he has described the privilege and *Miranda* as rules governing police conduct. See, e.g., Schulhofer, *supra* note 134, at 951 ("Absent safeguards as strong or stronger than those mandated by *Miranda*, [custodial police] interrogation, from the very outset, violates the Fifth Amendment" (emphasis omitted)); Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 435 (describing *Miranda* as a rule that "impose[s] limits on custodial police interrogation").

1. *The Miranda Exclusionary Rule*

A prominent feature of Fifth Amendment exceptionalism is the disparity between the limited *Miranda* exclusionary doctrine described in Part II and the robust suppression rules that apply when the government compels a statement in other settings. Particularly in the immunity context, the privilege requires the exclusion of the testimony and its fruits, both in the prosecution's case-in-chief and for impeachment.⁴⁹⁸ Because the Fifth Amendment privilege commands exclusion of all compelled statements "in any criminal case," whether obtained by use of immunity orders and contempt threats or through the pressure inherent in custodial interrogation, the same exclusionary rule should apply throughout, absent persuasive reasons for differential treatment.

The Court has offered two justifications for the reduced protection that it affords statements compelled during custodial interrogation as a result of noncompliance with the *Miranda* rules: (1) suppression of such statements in the prosecution's case-in-chief sufficiently deters violations of the *Miranda* rules, making additional use prohibitions more costly than beneficial,⁴⁹⁹ and (2) the *Miranda* requirements are prophylactic only, and thus do not merit the full measure of protection that violations of the Constitution receive.⁵⁰⁰ But, if one treats *Miranda* as an interpretation of the Fifth Amendment privilege, recognizing that it is a rule governing admissibility only, those justifications lose force.

498. See *supra* note 282.

499. See *Oregon v. Elstad*, 470 U.S. 298, 308 (1985) (referring to "the general goal of deterring improper police conduct," but noting that "the absence of any coercion or improper tactics undercuts" that rationale); *New Jersey v. Portash*, 440 U.S. 450, 458 (1979) (describing *Harris* and *Hass* as cases in which "the Court weighed the incremental deterrence of police illegality against the strong policy against countenancing perjury"); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) (determining that "there is sufficient deterrence when the evidence in question [(a suspect's statement made when questioned despite a request for counsel)] is made unavailable to the prosecution in its case in chief" and that otherwise, *Miranda* protection would "be perverted to a license to testify inconsistently, or even perjurally, free from the risk of confrontation with prior inconsistent utterances"); *Michigan v. Tucker*, 417 U.S. 433, 448 (1974) (determining that "[w]hatever deterrent effect on future police conduct the exclusion of [the defendant's un-Mirandized] statements may have had, we do not believe that it would be significantly augmented by excluding the testimony of the witness Henderson as well"); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (stating that "[a]ssuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question [(a statement made after defective warnings)] is made unavailable to the prosecution in its case in chief" and that to do otherwise would allow perjury without the risk of confrontation with any inconsistent statement).

500. See *Elstad*, 470 U.S. at 306-08 (adopting the view that "[s]ince there was no actual infringement of the suspect's constitutional rights," only a violation of the *Miranda* prophylactic standards, the testimonial fruit of a statement taken without warnings is admissible); *Tucker*, 417 U.S. at 445 (noting that the "case involved no compulsion sufficient to breach the right against compulsory self-incrimination," but rather, the violation was only a "disregard . . . of the procedural rules later established in *Miranda*" and that "[t]he question for decision is how sweeping the judicially imposed consequences of this disregard shall be").

Even if there were empirical support for the Court's claims regarding the deterrent effect of the less-stringent *Miranda* exclusionary rule,⁵⁰¹ its reliance on deterrence is misplaced. Because a violation of the privilege, and thus of *Miranda*, occurs only when the statement is used in a criminal case, not when a government actor elicits the statement, deterrence theory has no role in determining the scope of the *Miranda* exclusionary rule.⁵⁰² Unlike the Fourth Amendment context, where the Court makes frequent use of deterrence analysis,⁵⁰³ here there is no underlying wrong to deter. It makes no more sense to use such an approach in the *Miranda* context than it would to calibrate the suppression doctrine for immunized testimony based on whether it would deter prosecutors from using immunity grants to compel testimony from witnesses.⁵⁰⁴ In any event, once it has been determined that a statement has been compelled, the privilege requires suppression without consideration of the impact that it may have on government actors.

In addition, even if one accepts the Court's view that the *Miranda* rules are in some sense "prophylactic," it does not follow that *Miranda* merits only a watered-down exclusionary rule.⁵⁰⁵ When explaining the

501. The evidence that Professor Weisselberg has collected regarding efforts in California to train police officers to violate the *Miranda* rules in order to gain evidentiary advantage in the form of impeachment evidence and fruits of statements casts doubt on the Court's premise that sufficient deterrence results from suppression of statements taken in violation of the *Miranda* rules in the prosecution's case-in-chief. See Weisselberg, *supra* note 4, at 133-36.

502. See Loewy, *supra* note 25, at 927 (contending that "deterrence analysis has no place in fifth amendment jurisprudence").

503. See, e.g., *United States v. Leon*, 468 U.S. 897, 908-13 (1984) (describing the Court's use of deterrence analysis in a variety of settings); *United States v. Calandra*, 414 U.S. 338, 351-52 (1974) (rejecting the view that the suppression of illegally seized evidence in grand jury proceedings will deter police misconduct).

504. See Loewy, *supra* note 25, at 925 ("We do not talk about penalizing Congressmen or penalizing prosecutors when those whom they have compelled to testify are granted use immunity.").

In addition, there is no reason to believe that the countervailing concern in *Harris* and *Hass*, a desire to combat perjury, is any more acute in the *Miranda* context, where the Court has given it effect, than in the immunity context, where the Court has not. Indeed, there may be more cause to permit the use of a defendant's previously given immunized testimony to impeach his later contrary, and possibly perjurious, trial testimony than to permit impeachment use of a statement compelled during custodial interrogation. First, when a witness gives immunized testimony, he usually has prepared in advance, making any later discrepancies in sworn testimony more likely to be deliberate falsehoods. In contrast, a suspect likely is unprepared for custodial interrogation and may make honest mistakes when attempting to recall details of past events, increasing the likelihood that inconsistencies in later testimony are innocent. Second, in the immunity context, there will be a verbatim transcript of the earlier testimony, leaving little doubt about the nature and extent of discrepancies with later trial testimony. In the *Miranda* context, there may be less accurate records of what a suspect said, such as a police officer's oral recollection or a report purporting to summarize his statement. With a less reliable record, there is less certainty that the statement and trial testimony are indeed inconsistent.

505. The Court has offered two related reasons to support its characterization of the *Miranda* rules as "prophylactic." First, the Court has since reiterated what the *Miranda* Court made clear: that the specific rules described in *Miranda* are not required as long as there is some constitutionally acceptable equivalent method of dispelling the compulsion in custodial

prophylactic nature of the *Miranda* rules, the Court distinguishes between suspects' statements that are taken in violation of the *Miranda* rules but are nonetheless voluntary, and those that police obtain by means that violate due process.⁵⁰⁶ According to the Court, while the latter merit robust suppression rules, the former involve only violations of prophylactic rules and thus warrant a less severe response—exclusion of the statement itself in the prosecution's case-in-chief and nothing more.⁵⁰⁷ But this approach ignores the possibility that a statement that is not "coerced" or "involuntary" under the due process approach⁵⁰⁸ nonetheless may be "compelled" within the meaning of the privilege. Although "coercion" and "compulsion" are synonymous in common usage, the "coercion" that due process prohibits and the "compulsion" that triggers the Fifth Amendment privilege are not the same.⁵⁰⁹ Two differences matter here.

First, the Court has suggested that there must be official misconduct of some sort for there to be a due process violation.⁵¹⁰ But perfectly lawful official pressure—such as threats of contempt and economic sanctions—

interrogation. Second, the Court has explained that police can violate the *Miranda* rules without violating the Constitution itself. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993) (giving both explanations).

506. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 310 (1985) ("The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced . . ."); *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984) ("[T]he failure to provide *Miranda* warnings in and of itself does not render a confession involuntary . . ."); see also Schulhofer, *supra* note 134, at 949-50 (describing the Court's requirement of proof of actual "coercion that would render a confession involuntary in traditional Fourteenth Amendment terms" rather than simply evidence of failure to comply with *Miranda* rules).

507. See, e.g., *Elstad*, 470 U.S. at 307 ("But the *Miranda* presumption [of compulsion], though irrefutable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted.").

508. The Court uses the terms "coerced confession" and "involuntary confession" interchangeably. See *Arizona v. Fulminante*, 499 U.S. 279, 287 n.3 (1991).

509. There is disagreement about whether the amount of pressure necessary to constitute "compulsion" for purposes of the Fifth Amendment is the same as that needed to render a statement "coerced" or "involuntary" for purposes of due process. Compare Kamisar, *A Close Look*, *supra* note 23, at 391 ("Much harsher police methods were needed to render a confession 'coerced' or 'involuntary' under the pre-*Miranda* [due process] test than the *Miranda* Court deemed necessary to make a confession 'compelled' within the meaning of the self-incrimination clause."), Schulhofer, *supra* note 134, at 948-51 (contending that less pressure is needed to trigger the privilege than to violate due process), Schulhofer, *Miranda's Practical Effect*, *supra* note 370, at 549-53 (same), and Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 440-46 (same), with GRANO, *supra* note 134, at 135-41 (contending that "coercion for Fifth Amendment purposes" should not be interpreted to be "a less demanding concept than coercion for due process purposes" (emphases omitted)), Grano, *Reply*, *supra* note 23, at 182-86 (same), and Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 926-37 (1979) (same).

As the text makes clear, the point here is not to compare the amount of police pressure needed to activate the protections of the privilege and due process. Rather, the point being made is that (1) some sorts of pressure, such as threats of lawful sanctions, can trigger the privilege without violating due process, and (2) the Court uses different approaches when determining whether there is due process "coercion" or Fifth Amendment "compulsion."

510. See *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986) (requiring "police overreaching" for there to be a due process violation when police obtain a statement from the suspect).

can constitute Fifth Amendment “compulsion.”⁵¹¹ Thus, even if one accepts the Court’s view that violations of the *Miranda* rules are not necessarily due process violations, it is not clear why that has any impact on the scope of the *Miranda* exclusionary rule. The question is not whether police have overreached, committing misconduct sufficiently egregious to violate due process. It is whether their act of conducting custodial interrogation without giving warnings or honoring assertions of rights constitutes compulsion sufficient to trigger the Fifth Amendment privilege. Just as the lawful pressure of an immunity grant or a threat of job forfeiture can qualify as compulsion (and, at the same time, not run afoul of due process), so can the pressure that police bring to bear in an interrogation room qualify as compulsion, even if perfectly legal.

Second, when applying the due process approach, the Court assesses the surrounding circumstances in order to decide whether police have coerced a statement.⁵¹² In contrast, it determines whether official conduct constitutes Fifth Amendment “compulsion” by employing a categorical approach, focusing on the nature of the official pressure generally, not on a fact-specific, case-by-case basis.⁵¹³ Importantly, the categorical method is “analytically indistinguishable” from a prophylactic rule like *Miranda*.⁵¹⁴ In

511. See *supra* Subsections I.A.2-3 (describing the use of threats of contempt in connection with immunity grants to compel testimony and threats of job termination to force public employees to answer job-related inquiries). Although the Court once employed due process to justify exclusion of statements compelled from public employees by threats of job termination, it later shifted its reliance to the privilege against self-incrimination to explain suppression of such statements. See *supra* notes 84-86 and accompanying text.

512. See *supra* note 488 (describing the due process approach).

513. For example, when the Court, in *Garrity v. New Jersey*, 385 U.S. 493 (1967), mandated suppression of statements that police officers made following threats of job termination, it did not require proof that the threats had caused the officers to answer questions. Instead, it held that the use of such threats, as a categorical matter, requires exclusion. See *supra* notes 78-87 and accompanying text (describing *Garrity*). Professor Dripps has described this feature of the privilege:

Fifth Amendment law generally . . . defines compulsion according to general categories rather than on a case-by-case, totality-of-the-circumstances approach. For example, when a grand jury witness negotiates an immunity agreement through counsel, the immunized testimony may very well include some statements that the witness would have been willing to make even without immunity. Yet there is no statement-by-statement inquiry as to which statements were caused by the threat of contempt. Comment on defendant’s failure to testify is deemed compulsion, without any case-specific inquiry into whether the particular defendant has any reason other than guilt for standing silent (such as a prior conviction that would be admitted to impeach).

Dripps, *supra* note 266, at 25; see also Schulhofer, *supra* note 134, at 946-48 (arguing that the Court does not apply a totality-of-the-circumstances approach in cases involving privilege).

514. Strauss, *supra* note 23, at 205; see also Strauss, *supra* note 126, at 961-66 (contending that the Court’s First Amendment categorical jurisprudence parallels the *Miranda* prophylactic rule); Strauss, *supra* note 23, at 195-207 (describing a host of per se and categorical rules that the Court employs when interpreting constitutional provisions and contending that they operate in the same way as prophylactic rules). Indeed, although he was the leading scholarly opponent of substantive prophylactic rules, Professor Grano apparently conceded that they are functionally similar to categorical constitutional rules, which he believed to be legitimate. See Grano, *Prophylactic Rules*, *supra* note 23, at 106-23. In contrast to prophylactic rules, which Grano

both cases, the question is not whether a particular answer to a particular question in fact was compelled; it is whether, as a general matter, the official conduct that preceded the response constitutes Fifth Amendment "compulsion." Thus, although it may be possible to conjure up situations in which an un-Mirandized suspect answers questions during custodial police interrogation without feeling pressured to do so⁵¹⁵ (and to debate how often this occurs⁵¹⁶), one also can hypothesize cases in which a witness or suspect who answers questions when faced with contempt or job termination would have done so without such threats.⁵¹⁷ In Fifth Amendment contexts other than *Miranda*, the possibility that there may be instances free of actual compulsion does not matter. The Court employs a robust suppression doctrine without regard to whether any particular responses in fact were compelled.⁵¹⁸ Because the Court has never retreated from the conclusion that, as a general matter, custodial interrogation is inherently compelling absent the dispelling effect of police compliance with the *Miranda* requirements (or an effective substitute),⁵¹⁹ the characterization of the

described as rules that can be violated even when the Constitution is not, *id.* at 105, a categorical constitutional rule is one that defines the constitutional violation itself by use of a *per se* rule. Thus, "a slight change in rationale can alter the proper categorization [and, to Grano, dictate the legitimacy] of a rule." *Id.* at 115.

515. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 533-34 (1966) (White, J., dissenting) (criticizing the *Miranda* decision for determining a statement to be compelled even if made by a suspect arrested on a showing of probable cause who, after being advised only of the right to silence, responds to the single question, "Do you have anything to say?"); Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 448 (describing the "case in which a law professor-suspect knows his rights and is not in fear of abuses, in which he tells all in response to the first question, not because of any sense of pressure but simply because he wants the truth to come out").

516. Compare Schulhofer, *Reconsidering Miranda*, *supra* note 23, at 453 (referring to "the rarity of cases in which compelling pressures are truly absent"), with Strauss, *supra* note 126, at 961 & n.15 (noting that "it is possible to imagine relatively realistic situations in which custodial questioning without warnings would produce answers that we would not characterize as 'compelled' in the ordinary sense of that term" and suggesting that prewarnings statements that the suspect in *Oregon v. Elstad* made in his home before being told he was under arrest and in response to a police officer's statement, not a question, might be an example).

517. The Fifth Amendment "compulsion" inquiry is overbroad in two ways. First, there is no determination whether the person subject to the pressure might have made a statement even in the absence of pressure. For example, it did not matter to the Court whether one or more of the police officers in *Garrity* may have been willing to answer questions even if there had been no threat of job termination. Second, the Court treats all post-threat statements and testimony as compelled, even if answers to some questions, standing alone, in fact may not be compelled or even support an assertion of the privilege. Thus, for example, all of a witness's immunized testimony is suppressed, even answers that are not self-incriminating.

518. The Court has not addressed the scope of the *Garrity* exclusionary rule. See *supra* note 103. Lower courts have determined that it is commensurate with the protection that immunized testimony receives. See Clymer, *supra* note 84, at 1327 & n.69 (discussing the rule).

519. Indeed, in *Dickerson*, the Court acknowledged "the 'compelling pressures' inherent in custodial police interrogation." *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (quoting *Miranda*, 384 U.S. at 467).

Miranda rules as “prophylactic” does not warrant a less rigorous exclusionary rule than that which applies in the immunity context.⁵²⁰

The Court’s failure to provide persuasive reasons for differential treatment does not mean that violations of the *Miranda* rule must trigger the same stringent suppression that the immunity doctrine imposes. Even if the justifications that the Court has offered for reduced protection of statements taken in violation of the *Miranda* rules are deficient, there may be other reasons. It is beyond the scope of this Article either to identify the full range of factors that the Court should consider when determining the proper scope of the *Miranda* exclusionary rule, or to offer a definitive conclusion as to what that scope should be.⁵²¹ Instead, what follows are some preliminary and tentative thoughts about calibration of the *Miranda* exclusionary rule.

First, it may be appropriate for the Court to consider the circumstances under which various statements are compelled and the effect of a robust suppression requirement on criminal prosecutions.⁵²² In the immunity context, prosecutors typically make decisions after conducting considerable investigation and thoroughly assessing the costs and benefits of an immunity grant.⁵²³ Although immunity does not necessarily foreclose future prosecution of the immunized witness for matters described in the immunized testimony, it can make such prosecution difficult. A previously immunized defendant can challenge the indictment and the prosecution’s evidence, imposing on the prosecutor the burden of demonstrating that the contested indictment and evidence are not “tainted”—that is, derived from the defendant’s immunized testimony. Failure to meet that burden may require dismissal of an indictment or suppression of evidence, even if the indictment or evidence in fact is not tainted.⁵²⁴ Aware of that burden,

520. See Kamisar, *Foreword*, *supra* note 23, at 893 (questioning the differences between the Court’s treatment of statements taken in violation of *Miranda* rules and its treatment of immunized testimony and involuntary confessions).

521. For an effort to determine the appropriate level of protection for various situations in which the government seeks to use compelled statements in criminal cases, see Bloch, *Compelled Statements*, *supra* note 103, at 1693-700.

522. Justice O’Connor has adopted such an approach, relying on differences between “persons asserting their Fifth Amendment privilege to a court or other tribunal vested with the contempt power” and “suspects subject to informal custodial police interrogation,” to support her view that the privilege requires suppression of fruits of statements compelled in the former setting, but not in the latter. See *New York v. Quarles*, 467 U.S. 649, 669-72 (1984) (O’Connor, J., concurring in part and dissenting in part).

523. Decisions to immunize witnesses “are made before interrogation, normally by lawyers, acting with sufficient time to decide, calmly and rationally, whether it is more valuable to compel the testimony and suffer the resulting use preclusion or to forgo the testimony and retain the unfettered ability to prosecute.” Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 831 (1978); see also Dripps, *supra* note 266, at 39 (describing how “prosecutors have the great luxury of deferring immunized testimony until the conclusion of their other investigative work”).

524. See, e.g., Clymer, *supra* note 84, at 1321-27 (describing restrictions on prosecutorial use of immunized testimony and the prosecution’s burden of proving that it has not made such use).

prosecutors exercise their discretion to grant immunity with considerable care and often take steps in advance to ensure that they later are able to disprove taint.⁵²⁵

In contrast, police sometimes violate *Miranda* rules inadvertently. Furthermore, they often conduct interrogation (and thus commit *Miranda* violations) early in an investigation, before there is time to develop other evidence, making more evidence subject to potential challenge as tainted in the event of a violation of the *Miranda* rules.⁵²⁶ This not only increases the likelihood that some evidence in fact will be derived from the compelled statement, but it also increases the risk that the prosecution will be unable to disprove taint, even when the evidence is not so derived.

These differences suggest that an alternate approach may be in order in the *Miranda* context, one that reduces the risk that police officers' conduct will impair or foreclose prosecutions while safeguarding the privilege. One way to address these concerns would be to require suppression of all evidence derived from the compelled statement, as is done in the immunity context, but to shift the burden of proof regarding taint to the defendant, at least in those cases in which there is no evidence of a deliberate police violation of the *Miranda* rules.⁵²⁷ By requiring that defendants prove taint to gain suppression, the Court could prevent situations in which the prosecution loses evidence because of its inability to disprove taint when, in fact, there is no taint. Of course, with the transfer of the burden to the defendant comes the risk that he will be unable to gain suppression of tainted evidence because of a failure of proof. But, as an accommodation to the above-described concerns, this approach is far more favorable to criminal defendants than the doctrine presently in place, by which even evidence derived from statements taken in deliberate violation of the *Miranda* rules is admissible.

Second, assessment of the nature of the compulsion may have a bearing on the proper scope of the exclusionary rule. In the immunity and penalty cases, a government official communicates an explicit and credible threat of penalties that will follow a refusal to answer questions. In the *Miranda*

525. See *id.* at 1329-30 (describing measures that prosecutors take to minimize adverse consequences of an immunity grant, including "canning" or preserving evidence discovered before the immunity grant).

526. On this point, Dripps stated:

The time frame within which the police may question the suspect under the *Miranda* rules is measured in hours. If a tainted statement leads police to other evidence, the prosecution will have much more difficulty proving inevitable discovery or independent source than is encountered by prosecutors proceeding under an immunity statute.

Dripps, *supra* note 266, at 39.

527. When police deliberately violate the *Miranda* rules, their conduct is more akin to the calculated immunity decisions that prosecutors make. As a result, such cases may merit the assignment of the burden on the question of taint to the prosecution, as is done in cases involving immunized testimony.

setting, there need not be explicit threats. Indeed, if a police officer were to make threats similar to those used in the immunity or penalty cases in order to extract a statement, he almost certainly would violate due process.⁵²⁸ Instead, the suspect's isolation, loss of freedom, and lack of access to guidance and assistance, as well as police pressure to answer questions, combine to create a form of compulsion that is "qualitatively different" than that used in the immunity and penalty cases.⁵²⁹ Although it is not self-evident that one sort of compulsion warrants more rigorous prohibitions on the use of resulting statements than the other,⁵³⁰ these differences merit consideration.⁵³¹ An approach offering different degrees of protection based on the type of compulsion involved would be problematic, however. As described above, the Fifth Amendment privilege is a categorical rule that does not involve case-specific inquiries into the nature and amount of compulsion used to obtain statements.⁵³² But, it is conceivable that the Court could adopt a multitiered approach to the privilege, recognizing that different types of compulsion merit different suppression rules.

Third, although some scholars have suggested that the Court respond to police officers' strategic noncompliance with the *Miranda* rules by prohibiting impeachment use and/or use of fruits of statements in those

528. *Cf. Lynum v. Illinois*, 372 U.S. 528, 534 (1963) (finding a confession involuntary under the due process test when the police threatened to terminate the suspect's welfare benefits and take her children from her).

529. Schulhofer, *supra* note 134, at 951 n.32.

530. Professor Schulhofer paints a particularly ominous portrait of custodial interrogation to support his contention that the pressures inherent in that setting "dwarf those faced by the public employee, the public contractor, or even many witnesses who (with the help of counsel) face a citation for contempt." *Id.* at 951. Schulhofer unduly minimizes the seriousness of the compulsion facing public employees and witnesses. Although they, unlike suspects in custody, may have access to advice of counsel, they nonetheless face potentially devastating consequences—which may include loss of their livelihood, pension, and career—if they refuse to answer. Whereas a lawyer can advise a person faced with such threats, she cannot help them escape those options. Thus, although a lawyer's assistance may dispel the compulsion inherent in custodial interrogation, it will not have the same effect in the immunity or economic penalty contexts.

At the same time, empirical studies suggest that custodial interrogation often is brief and not particularly threatening. *See* Cassell & Hayman, *supra* note 2, at 891-93, 903, 906 (describing a study in which only 1 of 86 observed interrogations lasted over an hour, most occurred during daytime, and only 9.2% of the suspects were questioned on more than one occasion); Leo, *supra* note 3, at 278-79 (describing a study in which 71% of interrogations lasted less than one hour and 92% lasted less than two hours, and in which yelling was rare and unfriendly touching did not occur); *see also* FRIENDLY, *supra* note 17, at 272-75 (contending that there often will be "scarcely any" compulsion after arrest). That said, there remain instances of offensive and coercive police interrogation practices. *See, e.g.,* April Witt, *False Confessions: Allegations of Abuses Mar Murder Cases*, WASH. POST, June 3, 2001, at A1 (discussing abusive police interrogation practices resulting in false confessions).

531. *But see* *Baxter v. Palmigiano*, 425 U.S. 308, 333 (1976) (Brennan, J., concurring in part and dissenting in part) (contending that "the Fifth Amendment does not distinguish among types or degrees of compulsion").

532. *See supra* note 513 and accompanying text.

cases involving deliberate violations of the rules,⁵³³ the Court should not adopt such an approach.⁵³⁴ If police who violate the rules do nothing wrong, a conclusion that rejection of Fifth Amendment exceptionalism demands, it should not matter whether they act deliberately.⁵³⁵ Elsewhere, the Court has determined that when police officers act legally, their subjective motivations are irrelevant.⁵³⁶

Fourth, if the Court were inclined to afford statements taken in violation of the *Miranda* rules more protection than mere exclusion of the statements themselves in the prosecution's case-in-chief, it could take at least some important incremental steps in that direction without great upheaval to existing law. For example, because there are more powerful incentives for police to disregard invocations of *Miranda* rights than to refrain from giving warnings at the outset of interrogation,⁵³⁷ the Court reasonably could limit its focus, at least initially, to "failure-to-honor" violations. Both *Tucker* and *Elstad* involved "failure-to-warn" violations, leaving the Court free to determine that the fruits of "failure-to-honor" violations are, like fruits of immunized testimony, inadmissible and to do so without disturbing any past decisions. In addition, because the Court twice has noted that its decision in *Hass*, permitting impeachment with statements taken following "failure-to-honor" violations, was predicated on its belief that police were not deliberately disregarding *Miranda* invocations to obtain ammunition for impeachment,⁵³⁸ it has the latitude to reverse direction gracefully if presented with contrary evidence.

533. See, e.g., Kamisar, *Confessions*, *supra* note 4, at 476-80 (criticizing the view that statements and other evidence linked to deliberate violations of *Miranda* rules should be admitted in the case-in-chief or for impeachment); Weisselberg, *supra* note 4, at 184-85 (proposing that the prosecution's use of statements and fruits resulting from violations of *Miranda* rules be permitted only when police do not deliberately violate the rules).

534. The Supreme Court of California rejected such an approach in *People v. Peevy*, 953 P.2d 1212, 1219 (Cal. 1998) ("Our review of the relevant high court authority indicates that . . . the *Harris* rule [permitting impeachment] applies even if the individual police officer violates *Miranda* and *Edwards* by purposefully failing to honor a suspect's invocation of his or her right to counsel.").

535. This view is not inconsistent with that portion of the burden-shifting approach described above that would place the burden of disproving taint on the prosecution when police officers deliberately violate the *Miranda* rules. The approach to burden-shifting is not based on the notion that the police act improperly by knowingly violating the *Miranda* rules. See *supra* note 527.

536. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (rejecting inquiry into the police officer's subjective motivation for a traffic stop when there was probable cause to make the stop); see also *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (rejecting an approach to the *Miranda* public safety exception that requires an assessment of the subjective motivation of the police officer, and holding that the exception applies if the police officer asks "questions reasonably prompted by a concern for the public safety").

537. See *supra* notes 311-313 and accompanying text.

538. The Court first reached that conclusion in *Hass* in 1975, describing the possibility that a police officer would deliberately violate the *Miranda* rules as a "speculative possibility." *Oregon v. Hass*, 420 U.S. 714, 723 (1975). In *Michigan v. Harvey*, the Court noted that "*Hass* was decided 15 years ago, and no new information has come to our attention which should lead us to think otherwise now." 494 U.S. 344, 352 (1990).

2. *The Public Safety Exception*

Although, as explained above, an attempt to reconcile *Miranda* with the Fifth Amendment privilege would require that the Court reject the reasoning of some of the cases described in Part II, it would not necessarily require that the Court overrule those decisions. The understanding that *Miranda* is a privilege-based rule of admissibility is inconsistent with the rationales the Court offered in the cases permitting impeachment with, and use of, fruits of statements taken in violation of the *Miranda* rules. However, the Court conceivably could reach similar results for other reasons, such as differences between the processes of immunizing witnesses and questioning in-custody suspects,⁵³⁹ the effect on criminal prosecutions of applying robust suppression rules to statements compelled in those contexts,⁵⁴⁰ and a comparison of the explicit compulsion employed in the immunity and penalty situations with the informal pressures of custodial interrogation.⁵⁴¹ In contrast, a serious effort to move away from Fifth Amendment exceptionalism likely would require that the Court overrule the *Quarles* public safety exception.

It is impossible to reconcile the recognition of a public safety exception, permitting the introduction of compelled or presumptively compelled statements, with the Fifth Amendment privilege. Unlike the Fourth Amendment, which uses the benchmark of reasonableness to determine constitutionality, the privilege flatly prohibits the use of compelled statements in criminal cases, no matter how badly or for what purpose the government may need the information that the compelled statement imparts.⁵⁴² For example, a prosecutor may believe that a suspected terrorist has knowledge of a plot to explode a bomb in a crowded public place, and be as certain about that outcome as the officers were certain that *Quarles* had discarded a dangerous handgun in the market. If the prosecutor wants to compel the suspected terrorist to disclose details of the plot by using the threat of a contempt sanction, she can do so only at the cost of exclusion of any resulting statement in a criminal prosecution of the suspected terrorist. The prosecutor would face the same sort of dilemma that the Court described in *Quarles*,⁵⁴³ but would have to make the hard

539. See *supra* notes 522-526 and accompanying text.

540. See *supra* notes 522-526 and accompanying text.

541. See *supra* notes 528-532 and accompanying text. For other approaches, see, for example, Amar & Lettow, *supra* note 69 (contending that the Court should interpret the privilege to permit use of all fruits of compelled statements); and Dripps, *supra* note 266 (attempting to reconcile *Harris*, *Hass*, *Tucker*, and *Elstad* with decisions dictating the scope of the exclusionary rules that apply to immunized testimony and coerced confessions).

542. There are some exceptions in noncriminal, regulatory settings. See *supra* note 50 and accompanying text.

543. See *supra* note 391 and accompanying text.

choice whether to lose potential evidence in order to protect public safety. The difficulty of that decision has no bearing on the requirement that the immunized testimony be suppressed. Although the prosecutor, unlike the officer in *Quarles*, may have more than "a matter of seconds" to make a decision,⁵⁴⁴ there is nothing to suggest that the operation of the exclusionary requirement of the privilege turns on whether the government actor has an opportunity to reflect on the decision to compel a statement.

By posing the issue as "whether [the police officer] was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*,"⁵⁴⁵ the *Quarles* majority missed the point. Whether there is a pressing concern for public safety or only an effort to solve a crime, neither the privilege nor *Miranda* ever dictates whether police efforts to compel a statement, by failure to give *Miranda* warnings or otherwise, are "justified." Instead, they leave the decision whether to use compulsion to the officer, and determine only that any compelled statements are inadmissible.⁵⁴⁶ As a result, the *Quarles* Court should have suppressed the statement as compelled.⁵⁴⁷

IV. CONCLUSION

The Court's recent opinions suggest that it views both the Fifth Amendment privilege and *Miranda* as rules of admissibility. That understanding finds considerable support in the text of the privilege, doctrines that permit the government to compel statements while prohibiting its use of those statements in criminal cases, lower federal court

544. *New York v. Quarles*, 467 U.S. 649, 657-58 (1984).

545. *Id.* at 654-55.

546. Both Justice O'Connor and Justice Marshall identified this flaw in the majority's approach. Justice O'Connor noted that "*Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State." *Id.* at 664 (O'Connor, J., concurring in part and dissenting in part). She correctly concluded that the state bears the cost and that "[w]hen police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial." *Id.* Using his own bomb hypothetical, Justice Marshall contended:

If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

Id. at 686 (Marshall, J., dissenting).

547. For a similar analysis of *Quarles*, see Loewy, *supra* note 25, at 923-25.

decisions, and the views of many scholars. It also leads inexorably to the conclusion that police do not have a constitutional obligation to comply with the *Miranda* rules. Unlike the Fourth Amendment, which imposes on police an affirmative duty to refrain from conducting unreasonable searches and seizures, *Miranda* operates by exacting an exclusionary cost for noncompliance.

Because avoidance of that cost is the principal reason for police to follow the *Miranda* requirements, the rigor of the *Miranda* exclusionary rule is critically important. If the *Miranda* regime is to serve its intended function of reducing pressure during custodial police interrogation, the Court must bolster the suppression rules. Under existing doctrine, there are evidentiary incentives that make it sensible for police to disregard *Miranda*'s guidelines, particularly the requirement that police terminate interrogation when suspects assert their rights to silence or counsel. As things stand, and likely will stand if the Court agrees with or leaves intact the federal appellate court opinions holding that *Miranda* is a rule of admissibility, *Miranda* promises largely illusory protections to both suspects and other members of the public and can do little to combat the compulsion inherent in custodial interrogation.

Recognition that *Miranda* is an exclusionary rule is a step toward reconciliation with its Fifth Amendment roots. When *Miranda* is viewed as a privilege-based rule of admissibility, it becomes clear that the reasons the Court has offered to limit its exclusionary effect are unpersuasive. Reliance on deterrence theory is misplaced, because there is no underlying wrong to deter. In addition, the privilege itself requires exclusion of compelled statements without consideration of the effect that suppression may have on police. Dependence on the prophylactic, and thus overbroad, nature of the *Miranda* requirements misses the point that the privilege itself is a categorical rule, and thus similarly overinclusive. Although the Court need not afford statements taken in violation of the *Miranda* rules the same stringent protection that *Kastigar* requires for immunized testimony, it should employ a less rigorous approach only if there is good reason to do so.

Unfortunately, it is unlikely that the Court will rethink the decisions in which it created the incentive structure that promotes police violations of the *Miranda* rules. That project would require some measure of commitment to the objectives that led the *Miranda* Court to craft its revolutionary opinion. In that regard, the recent *Dickerson* opinion is noteworthy for what it does not contain: any acknowledgment that the concerns that gave birth to *Miranda* were legitimate or any recognition of

the importance of *Miranda*'s role in addressing coercive interrogation.⁵⁴⁸ The present Court has little or no enthusiasm for *Miranda*'s underlying principles.⁵⁴⁹ It is hard to imagine this Court reversing direction and fortifying the *Miranda* exclusionary rule. It is far easier to envision the Court keeping *Miranda* intact, while simultaneously signaling to police that they are free to disregard it and can gain evidentiary advantages by so doing.

548. The *Dickerson* majority reasoned that *Miranda* was a constitutionally based decision, and thus immune from congressional abrogation, without endorsing either its reasoning or outcome. Instead, the Court noted only that it, at times, has treated *Miranda* as if it were a constitutional rule by applying it to state proceedings, *Dickerson v. United States*, 530 U.S. 428, 438-39 (2000), and by permitting state prisoners to raise *Miranda* claims in habeas corpus proceedings, *id.* at 439 n.3, and that both *Miranda* and later opinions have described it as if it were a constitutional rule, *id.* at 439-40 & nn.4-5. The *Dickerson* majority was unwilling to adopt even the basic tenets of the *Miranda* decision, attributing them to the *Miranda* Court, not to itself. *See id.* at 442 (noting that the *Miranda* Court "concluded that something more than the totality test was necessary"); *id.* at 440 (describing how the "*Miranda* Court" concluded that the warnings and waivers requirement was necessary to overcome the pressures of custodial interrogation).

549. *Id.* at 443 ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").